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No. 86-442

In the

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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September 18, 1986

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QUESTIONS PRESENTED

1. Does a district court have jurisdiction to issue a *status quo* injunction to prevent the surviving carrier in an airline merger from unilaterally recognizing one of two competing unions as the representative of the employees of both carriers, pending National Mediation Board proceedings to determine the appropriate craft or class and the bargaining representative, where:

> — the carrier cannot determine which union will command a post-merger majority, and the proper craft or class unit is unclear, and
>
> — the carrier's unilateral action in so recognizing one union in a craft or class of its choosing violates Section 2 of the Railway Labor Act?

2. Does the exclusive authority of the National Mediation Board to determine representation issues preclude a district court from preliminarily enjoining violations of Section 2 of the Railway Labor Act, where:

> — the violations cannot be remedied by the National Mediation Board, and
>
> — the carrier's unilateral action in recognizing one of two competing unions inevitably must affect the outcome of the representation election, and
>
> — the *status quo* injunction does not interfere with but rather preserves the jurisdiction of the National Mediation Board?

3. If there is federal jurisdiction, does a carrier in an airline merger violate the Railway Labor Act by unilaterally recognizing one of the two competing unions as the representative of the employees of both carriers, pending National

Mediation Board proceedings to determine the appropriate craft or class and the bargaining representative, where:

— the carrier cannot determine which union will command a post-merger majority, and the proper craft or class is unclear?

LIST OF PARTIES

The parties to the proceedings below were petitioner Air Line Employees Association, International and respondents Republic Airlines, Inc., Northwest Airlines, Inc., NWA, Inc., Brotherhood of Railway and Airline Clerks, and International Association of Machinists and Aerospace Workers. The named respondents include all of the parties to the proceedings below, other than petitioner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Air Line Employees Association, International ("ALEA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on August 7 and 11, 1986, respectively.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported; it is reprinted in Appendix A hereto, p. A-1, *infra*. The memorandum decision of the United States District Court for the Northern District of Illinois, Eastern Division (Holderman, J.) is also unreported; it is reprinted in Appendix A hereto, p. A-6, *infra*.

JURISDICTION

Petitioner brought this action in the United States District Court for the Northern District of Illinois, invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1337(a). On July 25, 1986, the district court dismissed petitioner's complaint for lack of jurisdiction. *See* p. A-6, *infra.*

On August 7, 1986, the Seventh Circuit entered its order affirming the decision of the district court; subsequently, on August 11, 1986, it issued its opinion. *See* p. A-1, *infra.* Petitioner did not file a petition for rehearing.

The jurisdiction of this Court to review the judgment of the Seventh Circuit rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to the federal question and commerce jurisdiction statutes, 28 U.S.C. §§ 1331 and 1337(a), this action involves the application and interpretation of Section 2, First, Third, Fourth and Ninth of the Railway Labor Act, 45 U.S.C. § 152, First, Third, Fourth and Ninth, and Section 3, Second of that Act, 45 U.S.C. § 153, Second, as applicable to air carriers pursuant to 45 U.S.C. § 182. Each of these statutes is reprinted in Appendix B, p. B-1, *infra.*

STATEMENT OF THE CASE

The Acquisition of Republic Airlines, Inc. by NWA, Inc. and Its Impact on Employee Representation

The issues presented by this case arise at a time of unprecedented restructuring and realignment of the airline industry. Actual and anticipated mergers, acquisitions, attempted take-overs, and consolidations are continuously in the news.[1]

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[1] *See, e.g., Wall Street Journal*, Sept. 10, 1986, at 3, col. 1; *N.Y. Times*, August 28, 1986, § D at 1, col. 2; *Wall Street Journal*, May 21, 1986, at 6, col. 1; *Travel Weekly*, March 27, 1986 at 1, col. 3; *Business Week*, March 10, 1986, at 107.

The impact of these management decisions on airline employees and their unions is far-reaching.

Involved here is the acquisition of Republic Airlines, Inc. ("Republic") by NWA, Inc. ("NWA"), pursuant to an agreement and plan of merger dated January 23, 1986, a transaction which was consummated on August 13, 1986.[2] NWA is the parent of Northwest Airlines, Inc. ("Northwest") which, upon NWA's acquisition of Republic, began to merge the two airlines operationally, although Republic's separate legal existence will continue, at least for the time being.

For many years, petitioner ALEA has been the certified collective bargaining representative of Republic's office, clerical, fleet and passenger service employees, who number 6,624 (not including approximately 1,000 employees on furlough). Northwest employs 6,435 ground employees in classifications corresponding to those represented by ALEA at Republic, 4,505 of whom are represented by the Brotherhood of Railway and Airline Clerks ("BRAC") and 1,930 of whom are represented by the International Association of Machinists and Aerospace Workers ("IAM").[3] BRAC and

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[2] By its own terms and by virtue of Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, the NWA/Republic merger agreement was contingent upon approval by the United States Department of Transportation ("DOT"). The DOT approved the acquisition on July 31, 1986. *NWA-Republic Acquisition Case*, DOT Docket 43754, Order 86-7-81 (July 31, 1986). Under Section 801 of the Federal Aviation Act, 49 U.S.C. § 1461, any DOT action affecting the certificate of an international air carrier is subject to disapproval by the President. Accordingly, in order to permit the acquisition to proceed immediately, the DOT approved the transfer of Republic's domestic and international certificates in separate orders with only the order transferring the international certificate being subject to Presidential disapproval. *Id.* Thus, NWA and Republic completed the agreed merger on August 13, 1986.

[3] The figures stated are taken directly from data submitted in evidence by Northwest during the DOT proceeding. Based on these figures, petitioner believes that it will be the presumptive majority union in the combined employee group in its craft or class following the Republic/Northwest operational merger. In

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IAM filed unopposed motions for leave to intervene in the district court as additional parties defendant and opposed petitioner's request for injunctive relief in the Court of Appeals.

The transaction between NWA and Republic, like many recent airline mergers, involves many labor organizations and thousands of employees. For any given craft or class, more than one union is often involved, and the crafts or classes on the merging airlines may not coincide. In the present case, for example, the office, clerical, fleet and passenger service employees of Republic are represented by ALEA, while employees in comparable job classifications are

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the district court, Northwest took the position that, because "[t]he craft or class configurations at Republic and Northwest differ significantly," it is "impossible at this time to state with certainty exactly how many office, clerical, fleet and passenger service personnel at Republic will be added to the BRAC-represented group at Northwest and how many will be added to the IAM-represented group." Northwest accordingly defended its decision to continue to recognize BRAC and IAM (*see* pp. 5-7, 20-24, *infra*) *solely* on the grounds that, in the context of a merger of two carriers, it was legally bound to recognize the unions on the surviving entity. While thus disputing petitioner's claim to a presumptive majority, Northwest did not assert that it acted from a belief that BRAC and IAM were the majority unions. In the Court of Appeals, Northwest's position had evolved to the point of asserting that, in extending recognition to BRAC and IAM, it had "in good faith, determined from the best information available which unions would be in the majority and should be recognized." Not only is that claim supported by *no* record evidence, it in fact flatly contradicts Northwest's assertions that it relied solely on its legal conclusions concerning the effects of mergers.

It is unnecessary to resolve any dispute as to which of the contending unions can command a post-merger employee majority, since it is sufficient for purposes of the question presented in this petition that Northwest has extended recognition to unions which have not been certified in a relevant post-merger craft or class and which cannot otherwise demonstrate clear-cut majority status.

represented by BRAC or IAM in differently defined crafts or classes at Northwest. Thus, the issues raised by the present case are all but certain to arise in every merger in which different unions represent employees on the merging carriers with respect to particular crafts or classes.

The BRAC/Northwest Transition Agreement

On July 13, 1986—a month prior to consummation of the merger and over two weeks before Department of Transportation approval of the merger—Northwest, without the participation or consent of ALEA, entered into an agreement with BRAC (the "Transition Agreement") (App. 148-67),[4] pursuant to which Northwest agreed, among other things:

> (1) to recognize BRAC as the exclusive collective bargaining representative of the combined post-merger group of employees in the craft or class represented by BRAC at Northwest immediately prior to the merger, even though Northwest conceded in the district court that it is impossible to determine whether the former Northwest employees will constitute a majority of the combined group on the new, merged carrier;
>
> (2) to transfer to BRAC responsibility for administration of the existing collective bargaining agreement between petitioner and Republic, including the substitution of the grievance procedure from BRAC's collective bargaining agreement with Northwest for the grievance procedure in petitioner's collective bargaining agreement with Republic and the replacement of the System Board of Adjustment theretofore in operation under petitioner's agreement with a System Board established under the BRAC/Northwest agreement;
>
> (3) to supplant the union security/dues checkoff provisions of petitioner's agreement with Republic in favor

[4] For the convenience of the Court, references to the record below are cited to the appendix filed by petitioner in the Court of Appeals and are cited herein as "App. [page No.]." Copies of that appendix were filed with the Clerk of this Court in connection with petitioner's application for injunction pending certiorari.

of the corresponding provisions in the BRAC/Northwest bargaining agreement, thereby compelling all 6,624 of petitioner's members employed by Republic, upon pain of losing their jobs, to become and remain members of BRAC and effectively shifting $115,000 in monthly dues income from petitioner to BRAC;

(4) to accept an integrated seniority list produced through BRAC by a BRAC-appointed committee of Northwest and Republic employees; and

(5) to make various other changes in petitioner's collective bargaining agreement with Republic, to be effective from consummation of the merger until November 1, 1986, at which time that agreement, with only minor exceptions, is to be abrogated completely and the terms of the BRAC/Northwest bargaining agreement are to become effective for the entire employee group to be represented by BRAC on the merged carrier.

Northwest is currently attempting to negotiate a similar agreement with IAM (App. 145, 202).

The Complaint in the District Court

The principal focus of the complaint is the allegation that by agreeing to extend recognition to BRAC as the exclusive representative of the post-merger employee group, without objective evidence supporting a good faith belief that BRAC would represent a majority of employees in the relevant post-merger craft or class, with knowledge that BRAC's majority status was actively disputed by petitioner and prior to any post-merger certification by the NMB, Northwest violated Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth. Petitioner sought a declaratory judgment and an order enjoining implementation of the Transition Agreement and maintaining the *status quo* pending the outcome of the NMB proceedings.[5]

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[5] The complaint also alleges that the carrier respondents violated Section 2, First of the Act by negotiating with BRAC and IAM concerning future terms and conditions of employment of Republic employees at a time, prior to the merger, when petitioner was indubitably the certified representative of those

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The jurisdiction of the district court was invoked pursuant to 28 U.S.C. §§ 1331 and 1337(a).

Proceedings Before the National Mediation Board

Petitioner learned of Northwest's intention to bargain exclusively with BRAC and IAM on July 7, 1986, and on July 11, 1986, filed a grievance under the grievance arbitration provisions of its collective bargaining agreement with Republic (App. 358-60, 362). Petitioner learned of the Transition Agreement on July 15, 1986, and filed the present lawsuit on July 18, 1986 (App. 360).

Since the NMB would not entertain a petition for an election to determine the representative of the employees in the appropriate craft or class *before* DOT approval of the Republic-NWA merger, *see Republic Airlines, Inc./Hughes Air Corp.*, 7 NMB 432 (No. 219) (1980); *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 49 (No. 15) (1980), petitioner filed its NMB petition on August 1, 1986, the day after DOT approval.[6]

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employees. Finally, the complaint requests an order compelling expedited arbitration of a grievance filed by petitioner under its collective bargaining agreement with Republic, challenging Republic's failure to structure its transaction with NWA in such a way as to bind Northwest to assume that agreement in its entirety and without changes.

[6] Under NMB policy, petitioner is automatically entitled to an election, based on its pre-merger check-off authorizations from more than half the employees who will make up the post-merger combined workforce in the affected crafts or classes. *See Republic Airlines, Inc. (North Central-Southern Merger)*, 7 NMB 21 (No. 11) (1979); 29 C.F.R. § 1206.2.

There are significant discrepancies in the craft or class configurations at Republic and Northwest which the NMB must resolve before it can conduct an election. This determination will require a hearing which, in all probability, will consume many months so that, notwithstanding the directive in Section 2, Ninth, 45 U.S.C. § 152, Ninth, that the NMB certify the representative within 30 days, no election will in fact occur for a considerable period of time. The 30-day provision is merely

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REASONS FOR GRANTING THE WRIT

I.

The Holding that Federal Courts Lack Jurisdiction to Maintain the *Status Quo* Pending National Mediation Board Proceedings Conflicts With Decisions of this Court, Lower Courts and the NMB, Renders Unenforceable Basic Rights Under the Railway Labor Act, and Raises an Important Public Issue Which Must be Resolved

A. The Court Below Decided an Important Question of Federal Law, Addressed by this Court in Other Contexts, Which Must be Settled in Order to Assure the Enforceability of Basic Rights Under the Railway Labor Act

The jurisdictional issue presented arises in a context in which principles established by this Court appear to clash. One line of cases, where review has been sought of NMB determinations of an employee representative, holds unequivocally that the NMB has unreviewable discretion to make such determinations.[7] A second line of cases holds—equally unequivocally—that federal courts are empowered to enforce a carrier's obligations, under Section 2, Third and Fourth of the RLA, 45 U.S.C. § 152, Third & Fourth, to refrain from interfering with, influencing or coercing its employees in the selection of their representative and to treat

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directive, not mandatory, *e.g., Air Florida, Inc. v. NMB*, 534 F. Supp. 1, 11 (S.D. Fla. 1982), *appeal dismissed*, 720 F.2d 686 (11th Cir. 1983), and, indeed, has already expired. Absent relief from this Court, during the entire interregnum between the consummation of the merger and the NMB's certification of the post-merger representative, BRAC and IAM will be acting as representatives of the entire post-merger employee group in whatever crafts or classes those unions and Northwest deem proper, without regard to the desire of the majority of the employees in either the craft or class so selected, or the ultimately determined craft or class.

[7] *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

only with the representative designated by a majority of the employees.[8] This latter line includes a case holding that the federal courts, not the NMB, constitute the proper forum to adjudicate and remedy "unfair labor practices" under the RLA.[9] Finally, a third line of cases holds that federal courts may enforce the obligations of carriers and employee representatives to submit minor disputes for resolution in accordance with the procedure mandated by Section 3 of the RLA, and on a proper showing, may preserve the *status quo* during the pendency of those proceedings.[10]

The complaint in the present case seeks enforcement of the "unfair labor practice" provisions of Section 2, Third and Fourth, of the RLA, and the protection of the minor dispute-resolution machinery under the RLA in a factual context which also gives rise to a representation dispute. Under this Court's decisions in the second and third lines of cases, the federal courts clearly have subject matter jurisdiction, unless the presence of a representation dispute automatically destroys that jurisdiction. *Only* if the present case and others like it involve an area of exclusive NMB jurisdiction and *only* if the first line of cases controls—regardless of claims otherwise justiciable under the second and third lines of cases—would subject matter jurisdiction be lacking, as held by the Court of Appeals in the present case.

The problem presented in this case—and many similar cases with which the lower courts have been increasingly

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[8] *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). *Cf. Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971).

[9] *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971).

[10] *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33 (1963); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528 (1960).

confronted since deregulation of the airline industry—is to determine what role, if any, the Railway Labor Act contemplates for the federal courts where, in connection with a representation dispute, a carrier commits violations of the substantive "unfair labor practice" provisions of the Act or contractual violations which otherwise would be subject to judicial remedy under the Act.

The NMB has stated emphatically that it has no power to control a carrier's conduct and that persons injured by violations of the statute must look to the courts for relief. *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13, (No. 3) (1980).[11] In an appropriate case the NMB can set aside an election on grounds of carrier interference, and can revise its own procedures to protect the integrity of the electoral process. But it cannot order a carrier to bargain with a union defeated by the carrier's unlawful conduct, much less afford relief to the victims of that conduct. *See, e.g., Laker Airways, Ltd.*, 8 NMB 236 (No. 79) (1981) (a case which the Board characterized as evincing carrier misconduct amounting to "the most egregious violations of employee rights in memory," but where the "extraordinary remedies" adopted by the Board were limited to setting aside the tainted election and revising the procedures to be utilized in the re-run election). Thus the NMB has declined requests for *status quo* orders in conjunction with its proceedings, saying that such requests should properly be addressed to the federal courts. *Republic Airlines, Inc./Hughes Air Corp., supra*, 8 NMB at 18; *Pan American World Airways, Inc.*, 7 NMB No. 110 (1980); *see also Air Florida, Inc.*, 9 NMB 100 (No. 32) (1981).[12]

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[11] As Northwest conceded in the district court, citing *Air Florida, Inc.*, 8 NMB 546 (No. 167) (1981); and *Western Airlines, Inc.*, 7 NMB 337, 338 n. 1 (No. 176) (1980), carriers themselves are not even *parties* to the representation proceedings before the NMB.

[12] In *Sea Airmotive, Inc. d/b/a Seair Alaska Airlines*, 11 NMB 87 (No. 33) (1983), the NMB—without intimating any view that its exclusive province had been invaded—relied on the issuance

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There is no doubt that, in the present case, if the NMB were to determine that Northwest is guilty of unlawful interference and coercion, or unlawful assistance to BRAC and IAM, it could take steps—such as modifying the ballot or its election procedures—to try to insure the fairness of the employee referendum. It could set aside the election or even refuse to certify BRAC or IAM if it found that the unlawful conduct had destroyed the possibility of a fair election. But it could not certify ALEA or order Northwest to bargain with ALEA if ALEA loses the election, even if that loss were the direct result of respondents' illegal conduct. The ultimate NMB sanction, if the "laboratory conditions" for a fair election are destroyed by the carrier's violations of the law, is to refuse to certify any union. Thus, as succinctly put by Judge Waters in *Air Line Pilots Ass'n, Int'l v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 181 (W.D. Ark. 1983), *aff'd in part on other grds,* 738 F.2d 339 (8th Cir.), *appeal dismissed as moot,* 746 F.2d 456 (8th Cir. 1984), "the employer wins." The carrier is actually rewarded for its illegal conduct.

More importantly, the NMB can do nothing to remedy the fact that, from the date of the merger to the conclusion of the NMB proceeding, the employees of the merged carrier will have thrust upon them a representative not of their own choosing, as guaranteed by the statute, but selected by their employer in the face of a flat statutory prohibition against carriers so much as *influencing* the choice of a representative. And the NMB can do nothing whatsoever to remedy the fact

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of a *status quo* injunction against the carrier by the District Court for the District of Alaska, in fixing the eligibility date for an election. Thereafter, the Board relied on the court's findings in the ensuing contempt proceeding as grounds for setting aside the election (which the union lost) and in adopting several other measures designed to favor the union if it was able to request a second election. *Sea Airmotive, Inc. d/b/a Seair Alaska Airlines,* 11 NMB 207 (No. 77) (1984). The court's decisions are unreported.

that, by virtue of the action of the carriers, the former Republic employees will be compelled to pay dues to unions which have never established their majority status, and which those employees have never had an opportunity to accept or reject. Nor can the NMB, even if ALEA wins the election, compel Northwest to abrogate the Transition Agreement or any other agreement it negotiates with its favored unions prior to the conclusion of the NMB proceeding. Nor can the NMB restore to petitioner the dues income wrongfully diverted from petitioner to BRAC. In short, the NMB is powerless to remedy the substantive effects of the alleged illegal actions. *See Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 507 (1971); *cf. Detroit & Toledo Shore Line Railroad v. United Transportation Union*, 396 U.S. 142, 158-59 (1969).

As this Court cautioned in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." Nonetheless, the precise effect of the decision below, and similar decisions declining jurisdiction where otherwise justiciable claims co-exist with representational issues, is to obliterate employee rights which Congress sought to protect in Section 2, Third and Fourth of the Act. It is naive to suppose that the NMB can properly perform its own functions if employers are free to engage in lawless conduct which effectively may determine the outcome of representation elections.[13]

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[13] Where a union ultimately loses a re-run election notwithstanding the indirect protections which the NMB can devise to try to neutralize employer violations of the law, it is impossible to say with assurance that the union's loss reflects the free choice of the employees. In such situations, which arise with some frequency, there is nothing the NMB can do but relax its requirements in future elections. *See Sea Airmotive, Inc. d/b/a*

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The issue thus lies at the heart of the administration of the Act. Protection of the employees' right to select their representatives free from carrier influence, coercion and unlawful assistance is the Act's cornerstone. *See Texas & New Orleans Railroad Co. v. Brhd of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930). Here, that protection has been abandoned. The importance of the issue is demonstrated by the repeated litigation spawned in the lower courts and the confused and conflicting responses which they have given.[14] With deregulation of the industry and the increasing num-

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Seair Alaska Airlines, 11 NMB 207, 209-10 (No. 77) (1984); *The National Mediation Board at 50—Its Impact on Railroad & Airline Labor Disputes* (NMB 1984) at 22-24. Under the decisions below, there is *no* tribunal with authority comparable to that of the National Labor Relations Board under the National Labor Relations Act to determine unfair labor practices arising in the context of a representation dispute, preserve the integrity of the election process by restraining such practices, assess their impact on the ultimate outcome, or order that the carrier bargain with a losing union were the loss is found to be attributable to employer misconduct.

[14] *See* pp.16-19, *infra*. The extent of the conflict is dramatically underscored by comparison of the decision below in this case with that in *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), which was affirmed by the Second Circuit. 404 F.2d 938 (2d Cir. 1969). In the *Pan American* case, BRAC, the certified union, demanded that Pan Am meet with it to negotiate a new bargaining agreement at a time when BRAC and a rival union were involved in an NMB proceeding to determine which union represented the affected employees. When Pan Am refused, BRAC threatened to strike and Pan Am sued for a declaration that it would be illegal for it to negotiate a new agreement with BRAC until after the conclusion of the NMB proceeding. The court held that it had jurisdiction over Pan Am's suit, noting that it was not being asked to determine the identity of the representative and that, by enjoining resort to self-help, the court was actually aiding the NMB.

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ber of airline mergers and acquisitions,[15] the question here presented is certain to recur with increasing frequency.

B. To the Extent this Court Has Considered the Jurisdictional Question, its Decisions Conflict with the Decision of the Court Below

The mechanistic approach to jurisdiction espoused by the court below cannot be squared with this Court's teachings in *Texas & New Orleans Railroad Co. v. Brhd of Railway & Steamship Clerks*, 281 U.S. 548, 569 (1930); *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937); and *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570, 580-81 (1971). Under the rule adopted below, analysis ends with the discovery of a representation dispute; where the facts disclose such a dispute, the federal courts lose jurisdiction even over otherwise justiciable claims arising on those same facts. This approach utterly fails to take into account "the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory," *Chicago & Northwestern Railway v. UTU*, *supra*, 402 U.S. at 579, and substitutes a rigid formula for the case-by-case approach directed by *Chicago & Northwestern Railway*. *Id.* at 577.

Under those decisions, and under the better-reasoned lower court decisions typified by *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969), and *Air Line Pilots Ass'n, Int'l v. Scheduled Skyways, Inc.*, 567 F. Supp. 171 (W.D. Ark.

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Here, Northwest has done precisely what the *Pan Am* court held was illegal: it has negotiated an agreement with BRAC at a time when an active representation dispute is occurring, and when, by its own admission, it is impossible to tell whether BRAC represents a majority—or even what the relevant post-merger craft or class will be.

[15] *See, e.g., N.Y. Times*, September 11, 1986, at 36, col. 3; *Wall Street Journal*, May 21, 1986, at 6 col. 1; *Travel Weekly*, March 27, 1986, at 1, col. 3; *Business Week*, March 10, 1986, at 107.

1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984), the proper inquiry is whether the relief sought will interfere with or usurp functions exclusively committed to the NMB. Of course, the courts must be alert to efforts, by artful pleading or otherwise, to lure them unwittingly into substituting their own judgment for that of the NMB with respect to determining the identity of the employee representative. At the same time, however, the federal courts have the responsibility to assure compliance with the essential mandates of the Act.

The issue here is *not* which union is the true representative of certain ground employees on the merged carrier. The fact is that no one knows, or can know, the identity of the representative until the NMB has determined the proper crafts or classes, conducted an election, and certified the results. The issue, rather, concerns the nature and extent of the carriers' duties and responsibilities under Section 2, Third and Fourth of the Act.

Petitioner has submitted the question of the proper representative to the NMB procedure and seeks judicial relief *only* to insure the neutrality of Northwest during that process. Judicial enforcement of carrier neutrality is clearly consistent with the purposes and objectives of Section 2, Third and Fourth of the Act, and the granting of such relief in no way would invade the province of the NMB.

It is true that, until the NMB can determine and certify the representative or representatives, a *status quo* injunction would mean that ALEA, BRAC, and IAM will continue to represent the employee groups which selected them to be their representatives in the past, and it is presumably this effect which the Fifth Circuit had in mind in stating that relief inherently involves a representation determination. *International Brhd of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983). But, absent maintenance of the *status quo*, the selection of the representative for the interim period effectively and irrevocably *will be made by the employer.*

There may be something to be said for permitting voluntary recognition by a carrier in the face of a representation dispute where there is clear-cut evidence that the union being recognized represents the majority of the affected employees.[16] But it is clearly more consistent with the statutory purpose to permit judicial intervention to compel employer neutrality by enforced continuation of the employees' historic representatives for the interval until the employees have an opportunity to make a new choice than to allow an employer to dictate the choice of representatives where, as here, it is impossible to tell which of the contending unions will ultimately establish itself as the choice of the majority. If the employer is permitted, in effect, to choose the representative and the employees later ratify the employer's favorite at the polls, it will never be known whether that representative's ultimate victory is or is not the result of the employer's granting the favored union "a deceptive cloak of authority with which to persuasively elicit additional employee support." *International Ladies' Garment Workers Union v. National Labor Relations Board*, 366 U.S. 731, 736 (1961).

Thus, limited judicial intervention is essential to protect the rights of the employees under Section 2, Third and Fourth of the Act, and will not intrude upon the exclusive province of the NMB. The previous decisions of this Court are consistent with these principles; the decision below seriously undercuts those same principles.

C. There is a Conflict Among the Lower Courts, Which this Court Should Resolve

Two conflicting responses emerge from decisions of the lower courts which have wrestled with this issue. One line

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[16] *But cf. Pan American v. IBT, supra*, 275 F. Supp. at 997, discussed *supra*, note 14, holding that, in the face of a genuine question concerning representation, the employer's obligation of strict neutrality precludes it from negotiating with *any* of the contending unions, including the certified union.

of cases—including the decision below—takes the position that, where the facts disclose that a representation dispute is involved, the courts are automatically ousted from jurisdiction.[17] Under those decisions, it is immaterial that the NMB's powers are inherently limited to measures designed to protect the integrity of the process by which the employee representative is selected and do not extend to fashioning or enforcing substantive remedies for other consequences of unlawful conduct. Nor is there room, in the view of these courts, for analysis as to whether the relief requested would impinge on the functions assigned by the Act exclusively to the NMB. Under the most extreme of these decisions, the courts are without power even to grant interim relief in aid of the NMB's jurisdiction and to preserve the *status quo* by preventing statutory violations during the pendency of an NMB proceeding.

Thus, implicit in these decisions and the decision below is the assumption that, the instant a representation dispute looms on the horizon, the federal courts must cede the entire field to the NMB, even though the same set of facts gives rise to issues otherwise justiciable under *Virginian Railway, Chicago & Northwestern* and *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad*—claims which are beyond the power of the NMB to remedy. Closely aligned, though less sweeping in their import, are decisions refusing requests for judicial intervention where, in a court's view, the request would require the court effectively to determine the identity of the employee representative, even though the complaint

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[17] *See International Brhd of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir, 1983); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 656 F.2d 16, 23 (2d Cir. 1981). *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962), cited by the Fifth Circuit in *Teamsters v. Texas International, supra*, for the proposition that the courts may not grant interim *status quo* injunctive relief, merely holds that *the particular relief there sought* would have altered, rather than preserved, the *status quo* and would therefore not have been a neutral judicial act.

on its face purports to raise statutory or contractual, rather than representational, issues.[18]

At the opposite end of the spectrum are numerous cases holding flatly that the courts are empowered to restrain violations of the substantive provisions of the Act and to grant injunctions preserving the *status quo*, notwithstanding the presence of representational issues.[19] Also supportive of

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[18] *E.g., Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962). In some cases in which judicial intervention has been refused, courts have intimated that there may be circumstances in which such intervention would be proper. *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Texidor v. Ceresa*, 590 F.2d 357 (1st Cir. 1978); *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976).

[19] *E.g., Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980) (recognitional picketing enjoined); *Adams v. Federal Express Corporation*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977) (jurisdiction to enjoin unlawful carrier interference during union organizing campaigns); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 567 F. Supp. 66, 77 (S.D. Tex. 1983) (order compelling arbitration of grievance proper notwithstanding pending NMB proceeding); *Air Line Pilots Association, International v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 181 (W.D. Ark. 1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984) ("If the court accepts [the argument that it is without jurisdiction to enjoin carrier interference and coercion], as long as the employer acts swiftly and acts decisively and interferes to the extent that the unionization effort fails, it may act with impunity .... That simply cannot be the law, and, in the court's view it is not the law"); *Union of Professional Airmen v. Alaska Aeronautical Industries, Inc.*, 95 LRRM 2868 (D. Alaska 1977)

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the conclusion that the federal courts may remedy and prevent violations of the law occuring during the course of a representation dispute are the cases sustaining employee causes of action for wrongful discharge in connection with union organizational efforts.[20]

Thus, there is a sharp conflict among the lower courts with respect to the jurisdictional issues raised in this case which this Court should resolve.

II.
To the Extent the Seventh Circuit Reached the Merits, its Decision is Contrary to the Railway Labor Act, NMB Precedent, and the Construction of Analogous Provisions of the National Labor Relations Act

Because the court below erroneously affirmed the dismissal for lack of jurisdiction, it did not decide the merits of ALEA's underlying claim. To the extent the Seventh Circuit did discuss the merits, however, its approach is contrary

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(enjoining carrier interference and coercion during and after conclusion of NMB proceeding); *Associated Pilots of Alaska International Air, Inc. v. Alaska International Air, Inc.*, 83 CCH Labor Cases ¶ 10,531 (D. Alaska 1976) (enjoining carrier interference during union organizational campaign and rejecting carrier's contention that dispute was within the exclusive jurisdiction of the NMB); *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 275 F. Supp. 986, 994 (S.D.N.Y. 1967), *aff'd sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969) (judicial intervention permissible where such intervention does not "constitute interference with or usurpation of functions exclusively committed to the [NMB] under § 2, Ninth of the Act").

[20] *E.g., Adams v. Federal Express Corp., supra*; *Burke v. Compania Mexicana de Aviacion*, 433 F.2d 1031 (9th Cir. 1970); *International Association of Machinists v. Altair Airlines, Inc.*, 481 F. Supp. 1359 (E.D. Pa. 1979); *Kent v. Fugere*, 438 F. Supp. 560 (D. Conn. 1977).

to the Railway Labor Act, NMB precedent, and well-established authority interpreting the analogous provisions of the National Labor Relations Act.

Reduced to its essentials, ALEA's claim is that Northwest violated Section 2, Third and Fourth, of the Railway Labor Act by negotiating with BRAC and IAM, and by entering into a labor contract with BRAC which purports to be generally applicable to the employees in the post-merger craft or class, at a time when BRAC and IAM were not certified in the overall employee group and could not clearly demonstrate their majority status, and when their representative status was actively disputed. Such conduct falls squarely within the statutory proscriptions. *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).

The principal argument advanced below in defense of Northwest's recognition of BRAC and IAM is that Northwest was required by law to recognize those unions. Northwest asserted that, under NMB decisions in merger cases, the certifications of all unions on the "acquired" carrier are automatically "extinguished by operation of law" (App. 194-95), so that only the certifications on the "acquiring" carrier—in this case, Northwest—survive. Respondents based this conclusion on their interpretation of the results in seven merger cases (App. 194-201).[21]

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[21] (a) *United-Capital Merger (1961) (citing Brotherhood of Railway and Steamship Clerks v. United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964), and *United-Capital Merger Case*, 33 CAB 307 (1961)); (b) *Allegheny-Lake Central Merger (1968) (citing* 48 CAB 664 (1968), *aff'd, Air Line Employees Association v. CAB*, 413 F.2d 1092 (D.C. Cir. 1969)); (c) *Delta-Northeast Merger (1971) (citing International Association of Machinists v. Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), and 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), and *Delta-Northeast Merger*, CAB Order 73-9-42 (1973)); (d) *North Central-Southern Merger*

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Even if respondents were correct[22] and the survival of the union certification were, in fact, simply a function of which of the carriers involved in the merger is the surviving entity, Northwest would still be legally obligated to refrain from dealing with BRAC and IAM with respect to the combined employee group. While on this assumption BRAC and IAM might, in some sense, be the "certified" unions, the teaching of *Pan Am v. IBT, supra*—the only case which appears to have squarely considered the question—is that the carrier must not negotiate new agreements even with the *certified* union during the pendency of a genuine representation dispute. Thus, the argument that the identity of the surviving carrier automatically determines the identity of the employee representative, even if correct, is irrelevant, since the carrier's obligations in these circumstances are not dependent upon the certifications.

In any event, acceptance of respondents' argument has the anomalous result that, under a statute expressly intended to protect the right of employees to select their own representative and to require that employers treat only with the

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(1979) (citing Republic Airlines, Inc., 6 NMB 817 (No. 1231) (1979) and 7 NMB 21 (No. 11) (1979)); (e) *Pan Am-National Merger (1979) (citing Pan American USA, Inc.*, 7 NMB 168 (No. 90) (1979)); (f) *Republic-Air West Operational Merger (1980) (citing Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 49 (No. 15) (1980)); (g) *Texas International-Continental Operational Merger (1982) (citing International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983)).

[22] That respondents' reading of NMB precedent is in error is amply demonstrated by *Continental Airlines*, 10 NMB 24 (No. 9) (1982), in which the NMB held that it is lawful for a merged air carrier to continue to recognize both pre-merger unions in a single post-merger craft or class, pending the NMB's certification of a single post-merger representive for the merged craft or class. Respondents were thus flatly incorrect in asserting that NMB precedent left Northwest no choice but unilaterally to recognize BRAC and IAM.

employee representative designated by the majority, the identity of the representative following a merger would nevertheless be determined by the legal form in which the employers choose to structure their transaction—a choice dictated by the employers' own purposes and having nothing whatsoever to do with the wishes of a majority of the employees. Worse yet, such a rule would create an opportunity for an unscrupulous employer to take advantage of its ability effectively to determine the identity of the interim representative to gain negotiating advantages. Thus, where a parent acquires a second airline subsidiary with the intention of merging its two carrier subsidiaries operationally, it could condition its selection of the surviving entity on the incentives the competing unions offered to persuade the parent to make one carrier the "acquiring" carrier.

The cases relied on by Northwest really stand for nothing more than the undoubted proposition that, in a merger situation, where one union has a clear majority of the combined post-merger employee group, the carrier is entitled voluntarily to recognize that union. In every case relied on by Northwest, there was solid evidence, at the time the union in question was voluntarily recognized by the carrier, that that union would enjoy the support of well over 50% of the post-merger group.[23] In all but two of the cases, the displaced

[23] In the *United-Capital* case, the opinion of the Sixth Circuit in *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, *supra*, makes clear that, prior to the merger, BRAC represented approximately 2,700 Capital employees compared to approximately 10,000 United employees in the comparable classifications. 325 F.2d at 578. Thus, BRAC did not have enough members to get an election under NMB rules and though it filed an application with the NMB seeking certification of the post-merger craft or class, 325 F.2d at 579, that application was voluntarily withdrawn by BRAC during the investigation stage of the NMB proceeding (App. 337).

Similarly, in *Allegheny-Lake Central*, none of the former Lake Central unions (of which petitioner was one) had enough members to entitle it to a representation election on the merged

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unions could not even muster the requisite 35% showing of

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property, even under the relaxed showing of interest required by the NMB in merger cases (App. 337). For example, as reflected in the decision in *Air Line Employees Association v. CAB*, 413 F.2d 1092 (D.C. Cir. 1969), prior to the merger, petitioner represented approximately 400 Lake Central passenger service employees, as compared to approximately 1,100 to 1,200 unrepresented Allegheny employees. 413 F.2d at 1093. Thus, petitioner could only claim about one-fourth of the post-merger craft or class (*id.*), not enough to obtain an election.

In the *Delta-Northeast* case, neither of the former Northeast unions had enough members to command an election (App. 197-98, 337). While comparative numbers are not available, the district court's decision in *International Association of Machinists v. Northeast Airlines, Inc.*, 337 F. Supp. 499 (D. Mass.), *aff'd*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), states that, prior to the merger, the IAM represented about 1,000 Northeast employees and that the total number of Delta's employees was nearly 21,000, all of whom were unrepresented except the pilots (*id.* at 500), thus indicating that the Delta group was by far the larger of the two.

The *North Central-Southern* merger was another case in which petitioner was a direct participant. In that case, the displaced union was able—just barely—to meet the NMB's showing of interest requirement and so secured an election (App. 337). But at the time the carrier announced its intention to recognize IAM as representative of the merged employee group, IAM had approximately 850 members employed by North Central, compared to approximately 450 members of the displaced union at Southern (App. 337). Thus, the pre-merger employee figures indicated that IAM enjoyed slightly under a 2-to-1 margin (*Id.*).

In the *Pan Am-National* merger, petitioner did not have a sufficient number of members to obtain an election (*Id.*).

In the *Republic-Air West* merger, the displaced union did not initially have 35% of the combined employee group on the basis of the pre-merger dues check-offs, so that when, prior to the merger, Republic announced its intention to voluntarily recognize IAM as representative of the post-merger combined group,

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interest to secure an NMB election.[24] It is therefore clear that *it is the question of majority status, not the form of transaction*, which governs. Such a rule is totally consistent with the policies of the Act.

Here, however, the identity of the majority union cannot be ascertained until the NMB has made its determination. Thus, Northwest's legal obligation is to remain scrupulously neutral during the selection process. Instead, Northwest has openly favored BRAC and IAM.

Indeed, to the extent the Seventh Circuit considered the question (*see* Slip Opinion at 4 n.4, p. A-4, *infra*), the court suggested that unless the majority status of one union is clear, a carrier may recognize and bargain with whichever union it chooses. That approach is flatly contrary to the Railway Labor Act's requirement that carriers may bargain only with majority unions, and is at odds with the NMB precedent discussed above.

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it had in hand evidence satisfactory to the NMB that IAM represented in excess of 65% of the employees (App. 337). Subsequently, the displaced union was able to secure enough additional authorization cards to obtain an election.

[24] Coincidentally, in all but one of the cases relied on by Northwest, the presumptive majority union was, in fact, the union of the "acquiring" carrier. But in the *Texas International-Continental* merger, notwithstanding the fact that Texas International was the "acquiring" carrier, it was Texas International's union which was displaced. The reason is perfectly plain: the Teamsters Union represented only 1,800 Texas International employees prior to the merger, whereas Continental employed some 4,000 employees in the same craft or class, all of whom were unrepresented (*IBT v. Texas International, supra*, 717 F.2d at 159-60), giving the Teamsters only about 30% of the post-merger total. *Id.* at 160. Thus, in the one instance in which the majority union did not happen to be the union on the "acquiring" carrier's property, it was the certification of the "acquiring" carrier's union which was "extinguished."

The Seventh Circuit's approach is also contrary to the well-established analogous rule under the National Labor Relations Act that an employer may not recognize a minority union, even if it has a good faith belief that it is a majority union. *See, e.g., International Ladies' Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).[25]

In sum, to the extent the court below reached the merits, its approach is contrary to the RLA, NMB precedent, and analogous authority under the NLRA. Particularly in view of the increasing frequency of mergers in the airline and railroad industries, the issue merits review by this Court.

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[25] It is well established that courts look to the NLRA in construing the RLA, unless there is a textual basis for divergent constructions. *See, e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A
(Opinions and Judgments Below)

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-2233

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellant,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC. and NWA, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5239—**James F. Holderman**, *Judge.*

SUBMITTED JULY 29, 1986—DECIDED AUGUST 7, 1986*—
OPINION AUGUST 19, 1986

Before CUMMINGS, *Chief Judge*, EASTERBROOK and RIPPLE, *Circuit Judges.*

PER CURIAM. The Air Line Employees Association, International (ALEA), the certified collective bargaining representative for 6624 ground employees of defendant Republic Airlines (Republic), appeals an order of the district court dismissing its complaint for lack of subject

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* We originally decided this case by unpublished order.

matter jurisdiction. We affirm the judgment of the district court.[1]

The merger of Republic with Northwest Airlines (Northwest) has just been approved by the Department of Transportation. It is anticipated that, unless the President disapproves those aspects of the proposed acquisition having implications for international travel,[2] the merger will soon take effect and a single airline, Northwest, will survive. In anticipation of this merger, Northwest entered into a transition agreement with two unions which currently represent its 6435 ground employees, the Brotherhood of Railway and Airline Clerks (BRAC) and the International Association of Machinists (IAM). Under the terms of that agreement, these unions would represent the newly-combined workforce of the post-merger entity.

In anticipation of the merger, ALEA brought this action in the district court seeking an injunction against the implementation of the Transition Agreement. In Count 1 of its complaint, ALEA claims that the defendants have violated their obligations under section 2, First of the Railway Labor Act (RLA), 45 U.S.C. § 152, First, to bargain solely with ALEA as the representative of the majority of the employees in the class or craft involved. In Count 2, ALEA contends that the defendants' conduct also violates their duties under section 2, Third and Fourth of the RLA, 45 U.S.C. § 152, Third and Fourth, by interfering, influencing or coercing their employees in the employees' choice of a bargaining representative and by favoring one union against another. ALEA also seeks,

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[1] The Air Line Employees Association, International (ALEA) has filed a motion to expedite the appeal. That motion is granted. It has also filed a motion for injunction pending appeal. We deny that motion as moot.

[2] *See* 49 U.S.C. § 1461. The Department of Transportation (DOT) has submitted the proposed merger to the President. The President has sixty days in which to notify DOT of his opposition, if any, to the merger. However, the President may notify DOT at any time during the sixty days of his intent not to oppose.

under these two counts, an injunction preserving the *status quo* pending resolution of the representation issue through an election conducted under the auspices of the National Mediation Board (NMB). In Count 3, ALEA alleges that the defendants' conduct is in violation of the ALEA-Republic bargaining agreement. Under this count, the plaintiff seeks an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision.

The district judge dismissed the action without a hearing. He concluded that the complaint was basically "a representational dispute over which the federal courts do not have jurisdiction." Order, No. 86 C 5239 (N.D. Ill. July 28, 1986).

We agree with the district judge. While this circuit has not had, before today, an opportunity to rule on the point, the district judge's decision was in conformity with—as he put it—"the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint." *Id.* Like the district judge, we find extended discussion neither necessary nor appropriate. After examining the precedent upon which he relied,[3] we find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. Judge Rubin's opinion for the Fifth Circuit in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983), is especially helpful. There, in a factual setting very similar to our own, the court held that, even though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute

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[3] *See International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB:

> The Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board. A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims.
>
> * * *
>
> Continuation of the contract in force unavoidably constitutes a determination of employee representation, and the conjunction of the two issues creates a conflict in principles, one dictated by the express statutory provision giving the Board sole jurisdiction over representation matters and the other implicit from the limited scope of the statute, that other disputes are reserved for judicial resolution.

717 F.2d at 161 (citations omitted).[4]

In short, like the Fifth Circuit, "[g]iven the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164. *Accord Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963).

---

[4] The National Mediation Board (NMB) considers the status of the acquired company's union as the certified bargaining agent to be erased by the merger. Therefore, NMB views actions by the new entity in favor of one union or the other to be voluntary recognition of a union. Although ALEA maintains that it is clearly the majority union (with 6624 members to BRAC and IAM's 6400 members), the numbers are not sufficiently lopsided to give ALEA a clear majority and the merger creates doubts as to the proper representative. *Cf. International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976).

No. 86-2233

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL, *Plaintiff,* v. REPUBLIC AIRLINES, INC., et al., *Defendants.*	Case No. 86 C 5239

ORDER

This cause arises out of the impending merger of Republic Airlines with NWA, Inc. Plaintiff represents nearly 7,000 employees of Republic Airlines and claims that, among other things, defendants are violating the Railway Labor Act, 45 U.S.C. § 151 *et seq.* by negotiating the future employment relationship of Republic employees with the unions currently representing Northwest's employees.

Before addressing the plaintiff's claims, the Court must first determine if it has jurisdiction to hear them.

In view of the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint, the Court must conclude that this is a representational dispute over which the federal courts do not have jurisdiction. *See International Brotherhood of Teamsters* v. *Texas International Airlines*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Association* v. *Texas International Airlines*, 656 F.2d 16 (2d Cir. 1981): *International Association of Machinists* v. *Northeast Airlines, Inc.*, 536 F2d 975 (1st Cir. 1976), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Railway & Steamship Clerks* v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. granted*, 377 U.S. 903 (1964), *cert. dismissed*, 379 U.S. 26 (1964) and authority cited therein.

James F. Holderman

APPENDIX B
(Statutes Involved)

STATUTES INVOLVED

28 U.S.C. § 1331

§ 1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337(a)

§ 1337. **Commerce and antitrust regulations; amount in controversy, costs**

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however,* That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49, only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

45 U.S.C. § 152, First, Third, Fourth and Ninth

§ 152. **General duties—Duties of carriers and employees to settle disputes**

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * * *

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

* * * *

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, that nothing in this chapter shall be construed to

prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * * *

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thrity days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed

necessary by it to carry out the purposes and provisions of this paragraph.

45 U.S.C. § 153, Second

§ 153. **National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.**

* * * *

System, group, or regional boards; establishment by voluntary agreement; special adjustment boards; establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases

which may be considered by such board shall be defined in the agreement establishing, it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the empolyees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board

may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. § 182

§ 182. **Same; duties, penalties, benefits, and privileges**

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151 to 152 and 154 to 163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

45 U.S.C. § 184

§ 184. **System, group, or regional boards of adjustment**

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an

appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181 to 188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in sections 151 to 163 and 181 to 188 of this title shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of sections 181 to 188 of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

No. 86-442 (3)

Supreme Court, U.S.
FILED
OCT 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RULE 28.1 LIST

Respondent NWA, Inc. is the parent corporation of respondents Northwest Airlines, Inc. and Republic Airlines, Inc. NWA, Inc. is also the parent corporation of Northwest Aircraft, Inc., Mainline Travel, Inc. and Northwest Aerospace Training Corp. Respondent Northwest Airlines, Inc. is the parent corporation of Montana Enterprises, Inc., Affiliated Enterprises, Inc., Compass 315 Ltd., Tomisato Shoji, and Gatwick Handling Ltd. Respondent Republic Airlines, Inc. is the parent corporation of Republic Energy Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-442

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Republic Airlines, Inc., Northwest Airlines, Inc. and NWA, Inc. respectfully request that this Court deny the petition for writ of certiorari submitted by the Air Line Employees Association, International ("ALEA"), seeking review of the Seventh Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The Operational Merger

NWA, Inc., the parent company of Northwest Airlines, Inc. ("Northwest"), acquired Republic Airlines, Inc. ("Republic") and operationally merged Republic into Northwest on August 12, 1986. The combined operation

is conducted under the Northwest name and in accordance with Northwest practices and procedures. All former Republic employees, including approximately 6,624 office, clerical, fleet and passenger service employees for whom ALEA had been the certified collective bargaining representative at Republic, became employees of Northwest on August 12.

Pursuant to its authority under the Railway Labor Act (the "Act"), the National Mediation Board ("NMB") has certified two crafts or classes at Northwest corresponding to the single ALEA-represented craft at Republic, and has certified two unions—the Brotherhood of Railway and Airline Clerks ("BRAC") and the International Association of Machinists and Aerospace Workers ("IAM")—as the collective bargaining representatives of those crafts. When the workforces were merged, Northwest followed the NMB's consistent policy of applying the bargaining structure of the "surviving" carrier to the combined workforce following an airline merger,[1] and assigned former ALEA-represented employees to the two Northwest crafts by matching former Republic job titles with the most closely corresponding job titles at Northwest.[2]

---

[1] The NMB has held that where an operational merger creates a single carrier for representation purposes, the certificates of unions at the "acquired" carrier are "extinguished by operation of law". Republic Airlines, Inc. and Hughes Air Corp., 8 N.M.B. 49, 56 (1980); *see also* Southern Airways, Inc., 6 N.M.B. 817 (1979). The NMB has long held that it will certify only one union, system-wide, for each craft or class of employees at a single carrier. National Railroad Passenger Corp. (Amtrak), 12 N.M.B. 80 (1985); Chesapeake & Ohio Ry., 9 N.M.B. 362 (1982); Union Pacific Railroad, 8 N.M.B. 434 (1981); United Air Lines, Inc., 5 N.M.B. 65 (1968); KLM Royal Dutch Airlines, 3 N.M.B. 1 (1953); Pullman Co., 1 N.M.B. 503 (1946). The NMB has no authority to split a craft among various unions. *See* Switchmen's Union v. National Mediation Board, 135 F.2d 785, 792-93 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943).

[2] For example, in the Pan Am-National merger, the NMB ruled that the pre-merger craft or class designation in effect at Pan Am,

Following the operational merger, Northwest continued to recognize IAM and BRAC as the certified representatives of all Northwest employees, including those added to the respective crafts as a result of the merger.[3] Although the former Republic employees remain subject to the collective bargaining agreement in effect at Republic prior to the merger, BRAC and IAM now administer that agreement for former Republic employees falling within their respective crafts. In order to facilitate the melding of the workforces, beginning in July 1986, Northwest sought to negotiate Merger Transition Agreements with BRAC and IAM governing, *inter alia*, 1) the integration of the Republic employees into the Northwest workforce (including seniority integration), 2) the eventual unification of the ALEA-negotiated collective bargaining agreement with the BRAC and IAM agreements, and 3) application of the BRAC and IAM union security clauses to former Republic employees. Northwest entered into such

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the surviving carrier, should prevail. Pan American USA, Inc., 7 N.M.B. 168 (1979). As a result, the single craft or class structure at National disappeared, and the former National employees became subject to the Pan Am craft structure.

> The National employees were folded into the Pan Am system according to their predominant duties at National. Because the two airlines had different craft and classification systems, employees who had belonged to the same bargaining unit at National were split into two different bargaining units at Pan Am.

Transport Workers Union v. CAB, 725 F.2d 775, 777 (D.C. Cir.), *cert. denied*, 105 S.Ct. 87 (1984).

[3] Under NMB policy, the union which represents employees of the surviving carrier becomes the representative of all the employees in the expanded unit. The displaced union is not entitled to participate in negotiations between the carrier and the surviving union. Such a result would create "chaos not only in the attempted negotiations, but in the administrative machinery for notification, the place and time of meeting, and the like." Order of Railway Conductors v. Switchmen's Union, 269 F.2d 726, 733 (5th Cir.), *cert. denied*, 361 U.S. 899 (1959).

an agreement with BRAC on July 13, 1986, and is attempting to negotiate a similar agreement with IAM.

Proceedings In The District Court

On July 18, 1986 ALEA filed a complaint seeking to prevent Northwest from bargaining with BRAC and IAM regarding the Merger Transition Agreements, and to compel Northwest to continue to recognize ALEA as the post-merger collective bargaining representative of the Republic employees. Count I alleged that by recognizing and bargaining with BRAC and IAM regarding post-merger terms and conditions of employment affecting the Republic employees, Northwest violated its duty under Section 2, First of the Act, 45 U.S.C. § 152, First, to bargain solely with ALEA. Count II alleged that such conduct constituted interference with, influence, and coercion of the Republic employees in violation of Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth. Count III sought to compel Republic to arbitrate a grievance filed by ALEA alleging that Republic had failed to require Northwest to recognize ALEA as the post-merger representative of the Republic employees. App. 4-21.[4] As relief for counts I and II, ALEA sought, *inter alia*, a court order enjoining Northwest from recognizing and negotiating with BRAC and IAM regarding the post-merger terms and conditions of employment for Republic employees, and requiring Northwest to negotiate any such agreement with ALEA. App. 9-10, 14. As relief for count III, ALEA sought an order requiring Republic to submit the grievance to arbitration before a system board of adjustment. App. 17-18. The relief sought in the grievance was that Northwest "continue to recognize ALEA as the bargaining representative and that [North-

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[4] References to "App." are to the appendix filed by petitioner in the court of appeals, copies of which petitioner has previously filed with this Court.

west] comply with the provisions of the [ALEA] collective bargaining agreement . . . ." App. 168.

The district court, noting "the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint," held that ALEA's complaint raised a representation dispute within the exclusive jurisdiction of the NMB, and accordingly dismissed ALEA's complaint for lack of jurisdiction. App. 329. The Court of Appeals for the Seventh Circuit affirmed on the same grounds. Pet. at A-1.

Pending Proceedings Before The National Mediation Board

On August 1, 1986 ALEA filed with the NMB a petition for an election to determine whether ALEA enjoys majority support of any post-merger craft or class of Northwest employees. On October 1, 1986 the NMB completed its hearing on the issue whether the craft or class structure it previously certified at Northwest will continue in effect, or whether another structure should be created. Briefing on this issue is to be completed October 24, 1986. ALEA also petitioned the NMB for the same relief it sought before the courts below, namely, a declaration that its certificate at Republic should continue to be recognized until the election is completed. The NMB has not yet ruled on ALEA's request.

REASONS WHY THE PETITION SHOULD BE DENIED

The decision of the court below that ALEA's complaint presented a representation dispute outside federal court jurisdiction does not warrant review by this Court. This Court's rulings in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), and its companion cases make clear that the NMB has exclusive jurisdiction in disputes over the designation of employee representatives, and do not permit exceptions to this statutory restriction on federal court jurisdiction even on an "interim" basis. Although ALEA characterizes its complaint as raising

statutory and contractual issues independent of its admitted representation disputes with BRAC and IAM, in fact ALEA's allegations are premised entirely on Northwest's recognition of BRAC and IAM as the post-merger representatives of former Republic employees for collective bargaining purposes. The decision below is consistent with uniform authority holding that federal courts have no jurisdiction to issue injunctive relief in disputes over representational status following an airline merger. Contrary to ALEA's suggestion that the denial of federal court jurisdiction in these circumstances allows statutory violations to go unremedied, the NMB is fully capable of addressing ALEA's representational concerns, and nothing in the decision below or in this Court's prior rulings prevents a federal court from exercising jurisdiction where the statutory or contractual issues are not dependent on representation issues for their resolution.

ALEA's disagreement with the NMB's policy that the certifications of unions on the "acquired" carrier in a merger are extinguished by operation of law does not provide a basis for the issuance of a *status quo* injunction in this case. If ALEA wishes to challenge the NMB's merger policy, it must do so directly by petitioning the NMB for certification. The current proceedings before the NMB provide the only proper means of protecting whatever representational rights ALEA may have. ALEA's reliance on NMB cases to support its substantive claims, although flawed, serves to confirm that ALEA's statutory and contractual allegations necessarily and directly raised representation issues within the NMB's exclusive jurisdiction.

I. The Seventh Circuit's Determination That The District Court Did Not Have Jurisdiction To Require Northwest To Recognize And Bargain With ALEA Following The Republic-Northwest Merger Neither Raises An Important Issue Requiring This Court's Attention Nor Conflicts With Decisions Of This Court Or Other Courts Of Appeals

A. The Ruling That ALEA's Complaint Raised A Representation Dispute Within The Exclusive Jurisdiction Of The National Mediation Board Does Not Merit Review By This Court

The NMB's exclusive jurisdiction to hear and resolve disputes between unions over who will represent employees of a carrier subject to the Railway Labor Act is well established. In *Switchmen's Union v. National Mediation Board, supra*, and two companion cases[5] decided in 1943, this Court definitively ruled that the Act commits the adjudication of representation disputes to the NMB. Thus, a controversy between unions as to which should be the proper representative of a craft of employees does not constitute a proceeding "arising under any law regulating commerce" over which the federal courts have jurisdiction. *General Committee of Adjustment v. Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, 337 (1943).

> However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive.

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[5] General Committee of Adjustment v. Southern Pacific Co., 320 U.S. 338 (1943); General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., 320 U.S. 323 (1943). *Accord*, Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650 (1965).

General Committee v. Missouri-Kansas-Texas R. Co., *supra*, 320 U.S. at 336 (footnotes omitted).[6] Thus, to the extent the decision of the court below was based on its determination that federal courts lack jurisdiction to hear representation disputes, it was undoubtedly correct.

Acknowledging that a dispute within the NMB's jurisdiction does in fact exist over who will represent the employees in the post-merger crafts (Pet. at 7), ALEA nevertheless contends that the "factual context" of the dispute also gives rise to statutory and contractual claims over which the federal courts do have jurisdiction, and that pursuant to that jurisdiction the courts below should have issued an injunction requiring Northwest to recognize and bargain with ALEA pending completion of the NMB proceedings. According to ALEA, such interim relief is necessary to preserve the NMB's jurisdiction over the representation dispute, and the absence of federal jurisdiction to issue an injunction in these circumstances will allow violations of the Act to go unremedied.

The Seventh Circuit's decision is not as broad as ALEA's characterization of it would suggest, nor does the absence of federal court jurisdiction to require a carrier to recognize and deal with a particular union following a merger carry with it the dire consequences that ALEA describes. Indeed, it is the exercise of federal jurisdiction in matters relating to representation disputes, and not the absence of such jurisdiction, that carries the potential to interfere with the NMB's statutory role and impair the employee protections created by Congress in

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[6] Section 2, Ninth of the Act, 45 U.S.C. § 152, Ninth, provides that "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . . it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties . . . the individuals or organizations that have been designated . . . to represent the employees involved in the dispute, and certify the same to the carrier . . . ."

the Act. Any challenge to Northwest's recognition of BRAC and IAM—and any request for interim relief pending completion of the NMB proceedings—must be made first to the NMB, in which Congress has vested complete authority to resolve controversies of this nature.

1. *The Court Below Correctly Determined That ALEA's Complaint Raised A Representation Dispute*

Whether or not the absence of federal court jurisdiction to address representation disputes might ever leave employees or their representative without a remedy for related violations of the Act, that is not the case herein. ALEA's complaint raised issues that fall directly within the scope of representation disputes that could have been —and now are—before the NMB for resolution. This is simply not a case in which the absence of federal jurisdiction in any respect impairs the ability of a union to protect its representational status.

As ALEA candidly explains in its petition, "[t]he principal focus of the complaint is the allegation that by agreeing to extend recognition to BRAC [and, presumably, IAM] as the exclusive representative[s] of the post-merger employee group . . . Northwest violated Section 2, Third and Fourth of the Act, 45 U.S.C. § 152, Third and Fourth." (Pet. at 6.) The relief sought in the complaint, and in the grievance that ALEA sought to compel Republic to arbitrate, was an order enjoining Northwest from recognizing and negotiating with BRAC and IAM regarding the post-merger terms and conditions of employment for Republic employees and requiring Northwest to negotiate any such agreement with ALEA. The court below was clearly correct in finding that ALEA's allegations, although framed in statutory and contractual terms, constituted a thinly disguised representation dispute. As of the effective date of the merger, all Republic employees became Northwest employees, and BRAC and

IAM were unquestionably the certified collective bargaining representatives of the Northwest crafts into which the Republic employees formerly represented by ALEA fell.[7] Section 2, Ninth of the Act requires that a carrier "treat with the representative so certified" by the NMB. The gist of ALEA's complaint was that Northwest nevertheless should recognize ALEA as the collective bargaining representative of the former Republic employees, and should be enjoined from bargaining with IAM and BRAC regarding the terms of their post-merger employment. This is precisely the kind of determination that the NMB —and the NMB alone—is empowered to make.

This case does not raise statutory or contractual issues independent of the representation dispute. It is the fact of recognition itself, and not some independent conduct on the part of Northwest, which is alleged to violate the Act and the ALEA agreement. The merit of ALEA's substantive allegations is dependent on a determination of which union is the post-merger representative of the former Republic employees. To require Northwest to recognize and bargain with ALEA in these circumstances necessarily decides the very question before the NMB. The same is true of ALEA's request for interim relief. For the period it is in effect, an injunction prescribing which union Northwest must deal with regarding its employees necessarily decides a representation dispute and invades the province Congress set aside for the NMB. This case presents nothing more than an attempt, by artful pleading, to obtain from a court what the Act mandates must be provided by the NMB.[8]

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[7] The NMB certifications of BRAC and IAM as employee representatives were not affected by the substantial increase in the size of the craft as a result of the merger. *See* IAM v. Alitalia Airlines, 600 F. Supp. 268 (S.D.N.Y. 1984), *aff'd per curiam*, 753 F.2d 3 (2d Cir. 1985) (certification still valid despite fact that unit began with only 11 employees and expanded to over 450 employees).

[8] As the Court of Appeals for the Sixth Circuit stated in rejecting just such an attempt:

2. *Courts Have Consistently Recognized That Injunctions To Preserve The Representational Status Of A Union Following A Merger Would Impermissibly Interfere With The NMB's Jurisdiction*

Contrary to the assertions in ALEA's petition, courts have not had any difficulty squaring the principle of exclusive NMB jurisdiction in representation cases with their own obligation to enforce carrier obligations under the Act. With its decision in this case, the Seventh Circuit joins four other courts of appeals in holding that federal courts do not have jurisdiction to require a carrier to recognize one union over another following a merger.[9] The courts have uniformly recognized that the issuance of an injunction requiring a carrier to recognize

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> By skillful pleading in this case, appellant has tried to avoid the consequences of [the *Switchmen's Union* trilogy], which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's contract obligations. . . . Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute.

Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

[9] International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983); International Ass'n of Machinists v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964); Division No. 14, Order of Railroad Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962). *See also* Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc., 656 F.2d 16 (2d Cir. 1981); Air Line Employees Ass'n v. CAB, 413 F.2d 1092 (D.C. Cir. 1969); Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

and negotiate with one of several competing unions following a merger would not be an act of neutrality unrelated to the NMB's functions. Such an injunction would constitute an active, interim disposition of the representation question. In this case, the relief requested by ALEA would divide the Northwest crafts and preserve the representative status of a union whose certification was "extinguished by operation of law" [10] upon the merger of Republic into Northwest. A judicially-imposed requirement that Northwest bargain with ALEA would, for the period it is in effect, determine the identity of the employee representative, and would do so in a manner contrary to NMB precedent and to the rights of BRAC and IAM.[11] Such a result clearly usurps the NMB's authority and crosses the line drawn by this Court in *Switchmen's Union* and its companion cases.

The cases cited by ALEA to establish a conflict among the circuits regarding jurisdiction to issue an injunction notwithstanding a related representation dispute simply do not involve the kind of direct interference with the NMB's function that is present here. More importantly, not a single case cited by ALEA grants relief similar to that requested herein, *i.e.*, an order requiring a carrier to recognize and bargain with a particular union whose representative status is disputed. Indeed, the cases cited by ALEA demonstrate that the courts have not found it difficult at all to distinguish between issues that infringe upon the NMB's exclusive jurisdiction and those that do not, and have not hesitated to exercise their jurisdiction over the latter.

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[10] Republic Airlines, Inc. and Hughes Air Corp., *supra*, 8 N.M.B. at 56.

[11] *See* Division No. 14, Order of Railroad Telegraphers v. Leighty, 298 F.2d 17, 21 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) (in post-merger representation dispute "an injunction . . . would not merely hold the line, without injury to either party . . . Rather, it would . . . give to Division 14 the rights it claims to the exclusion of Division 13.").

Thus, in *Summit Airlines, Inc. v. International Brotherhood of Teamsters*, 628 F.2d 787 (2d Cir. 1980), which ALEA cites to show that some courts have granted injunctions notwithstanding the presence of representation issues, the court merely upheld the issuance of an injunction against a union's efforts to bypass the NMB and force recognition through picketing and economic coercion. The Second Circuit noted that the carrier did not have a right to invoke NMB election and certification procedures,[12] so that the only way to enforce the mandate of Section 2, Ninth was to enjoin further economic coercion by the union. Similarly, in *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd sub nom. Brotherhood of Railway, Airline and Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), the court issued a declaratory judgment and an injunction against a strike by a union to force the carrier to recognize and bargain with it despite a pending NMB election to determine which of two unions was the true representative. The injunctions in *Summit* and *Pan American* did not require the carrier to recognize or negotiate with any one union, and their issuance did not decide a representation dispute or otherwise infringe on the NMB's authority. These cases in no respect support ALEA's claim of federal jurisdiction to issue an injunction in this case.

In *Adams v. Federal Express Corp.*, 547 F.2d 319 (6th Cir. 1976), *cert. denied*, 431 U.S. 915 (1977), the court held that jurisdiction existed to hear union claims that the carrier, through "threats, harassment, surveillance activities and selective discharges during the course of the organizational drive" had violated Section 2,

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[12] Summit Airlines, Inc. v. International Bhd. of Teamsters, *supra*, 628 F.2d at 793, *citing* Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees, 380 U.S. 650, 666 (1965).

Third and Fourth. ALEA has made no such allegations here, instead claiming only that the very act of recognizing BRAC and IAM constitutes improper influence and coercion. In *Air Line Pilots Association v. Texas International Airlines, Inc.*, 567 F. Supp. 66 (S.D. Tex. 1983), *appeal docketed*, No. 83-2272 (5th Cir. July 18, 1983), the court required the carrier to arbitrate a grievance complaining of the carrier's refusal to apply the existing collective bargaining agreement to a subsidiary carrier, at which the union was seeking representational status. In finding that requiring the carrier to arbitrate the grievance would not interfere with the NMB proceeding, the court contrasted the relief it was granting from that sought in *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), in which the union "had sought an order by the district court compelling the carrier to bargain with it . . . in the face of an ongoing representation dispute pending before the NMB . . . ." 567 F. Supp. at 77. In the present case, ALEA seeks both from the court and from court-ordered arbitration relief similar to that sought in *Ruby*, for which the *Texas International* court implied court jurisdiction would not exist. The allegations of employee coercion and interference in the remaining cases cited by ALEA [13] are based on the termination or layoff of employees during union organizing campaigns. The NMB has no authority to remedy such discharges, and the issu-

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[13] Burke v. Compania Mexicana de Aviacion, 433 F.2d 1031 (9th Cir. 1970); Air Line Pilots Ass'n v. Scheduled Skyways, Inc., 567 F. Supp. 171 (W.D. Ark. 1983), *aff'd in part on other grds*, 738 F.2d 339 (8th Cir.), *appeal dismissed as moot*, 746 F.2d 456 (8th Cir. 1984); International Ass'n of Machinists v. Altair Airlines, Inc., 481 F. Supp. 1359 (E.D. Pa. 1979); Union of Professional Airmen v. Alaska Aeronautical Industries, Inc., 95 L.R.R.M. (BNA) 2868 (D. Alaska 1977); Kent v. Fugere, 438 F. Supp. 560 (D. Conn. 1977); Associated Pilots of Alaska International Air, Inc. v. Alaska International Air Inc., 96 L.R.R.M. (BNA) 3233 (D. Alaska 1976).

ance of an injunction in such circumstances therefore does not interfere with the NMB's functions.[14]

Contrary to ALEA's characterization of decisions rejecting federal jurisdiction in representation cases as espousing a "mechanistic approach" to jurisdiction, courts have very carefully and correctly applied this Court's teachings in *Switchmen's Union*, and have found federal jurisdiction lacking only where its exercise would truly interfere with the NMB's statutorily mandated duties.[15] The record in the present case demonstrates that the jurisdictional issue was extensively briefed in the district court,[16] and that the ruling of the court below correctly applied the controlling legal principles. There is, in short, no conflict or confusion among the lower courts as to the limits on federal jurisdiction in representation disputes, and the decision of the court below in this case is entirely consistent with the principles on which those limits are based.

3. *NMB Procedures Provide The Means By Which A Union May Seek To Preserve Its Representative Status*

As becomes clear upon analysis of ALEA's complaint in light of controlling NMB authority, ALEA's real dispute is with the NMB's substantive policy that the certifi-

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[14] *See* Associated Pilots of Alaska International Air, Inc. v. Alaska International Air, Inc., *supra*, 96 L.R.R.M. at 3237 (Section 2, Ninth "provides an effective remedy for the resolution of representational disputes, including the company union situation and to compel a reluctant employer to bargain . . . . However, [Section 2, Ninth] provides no remedy for other violations, such as the unlawful discharges . . . herein alleged . . . .").

[15] *See, e.g.*, International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157 (5th Cir. 1983); Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

[16] *See* Memorandum In Support Of Defendant Northwest's Motion To Dismiss, Or In The Alternative, For Summary Judgment.

cate of the union at the "acquired" carrier in an airline merger is extinguished as a matter of law. By its suit here, ALEA seeks to obtain indirectly what it apparently has concluded it cannot obtain from the NMB itself. This is improper. *See Order of Railway Conductors v. Pennsylvania Railroad Co.*, 323 U.S. 166 (1944) (no review having been sought of NMB decision, court powerless to grant remedy directly or indirectly setting decision aside).

Moreover, ALEA is not without recourse before the NMB. ALEA can pursue at least three remedies in that forum. First, ALEA can ask the NMB to adopt a policy whereby the certificate of the union at an "acquired" carrier continues to be effective until an election is held to determine the post-merger employee representative. If the NMB were to issue such a change in policy, as ALEA has asked it to do, then ALEA's certificate would remain in effect and could be enforced in federal court. Another Republic union, the Association of Flight Attendants, also filed such a request. *See Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986).[17] Second, ALEA can ask the NMB to investigate whether Republic or Northwest is the "surviving" carrier.[18] If ALEA were able to convince the NMB that Republic rather than Northwest was the "surviving" carrier following the merger, ALEA's certificate would continue in effect, the certificates of BRAC and IAM would be extinguished, and ALEA would become the post-merger employee representative.

Third, ALEA can petition the NMB for an election. Section 2, Ninth of the RLA requires the NMB to act

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[17] The NMB determined that Northwest was the "surviving" carrier, and concluded that "[a]ll certifications issued on Republic Airlines were extinguished on August 12, 1986." Northwest Air Lines, Inc., 13 N.M.B. 399, 403 (1986).

[18] The "acquiring" carrier is not always the "surviving" carrier for representation purposes. For example, following the acquisition of Continental Airlines, Inc. by Texas International Airlines, Inc., Continental was the surviving carrier.

upon that petition within 30 days, although NMB action in an election often takes longer.[19] The NMB has repeatedly emphasized that this is the ousted union's proper recourse after it loses its representative status in a merger.[20] The NMB is now in the midst of just such a proceeding.[21]

B. The Decision Below Is Not Inconsistent With Decisions Of This Court Upholding Federal Jurisdiction To Enforce The Railway Labor Act

ALEA's contention that the decision of the court below is inconsistent with court decisions upholding federal jurisdiction to enforce Section 2, Third and Fourth of the Act is unpersuasive, and ignores the teachings of *Switch-*

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[19] Pending a decision by the NMB, the employees will be represented by BRAC or IAM, which have a duty to represent them fairly. Ford Motor Co. v. Huffman, 345 U.S. 330, 337 (1953); Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944). Under the Act, when one union succeeds another as a collective bargaining representative, the new union administers the labor contract executed by its predecessor. Order of Ry. Conductors v. Switchmen's Union, *supra*; Air Transport Employees v. Western Airlines, Inc., 105 L.R.R.M. (BNA) 3004, 3007 (C.D. Cal. 1980); Airlift International, 4 N.M.B. 142 (1967).

[20] Republic Airlines, Inc. and Hughes Air Corp., 8 N.M.B. 13, 18 (1980); Pan American USA, Inc., 7 N.M.B. 168 (1979). The NMB has evolved special procedures which make it easier for an ousted union to obtain an election after a merger than in other circumstances, and sometimes has required no showing of interest whatsoever. *See* Republic Airlines, 7 N.M.B. 21 (1979); Continental Airlines, 10 N.M.B. 24 (1982); Air West, 5 N.M.B. 85 (1968).

[21] ALEA's argument that the NMB's policy permits carriers to arrange the corporate form of their merger transaction so that one carrier or the other is the surviving entity, and thus predetermine whether one union or another will be recognized following the merger, is without merit. The NMB "has shown itself alert to prevent carriers from frustrating representation rights by artful corporate devices." Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc., 502 F. Supp. 423, 425 (E.D.N.Y. 1980), *aff'd*, 656 F.2d 16 (2d Cir. 1981). *See, e.g.*, Pan American USA, Inc., 7 N.M.B. 168 (1979).

men's Union that the withholding of federal jurisdiction in representation matters is a result of congressional restriction, not judicial discretion. To be sure, in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930), *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), and *Chicago & Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971), this Court ruled that federal courts did in fact have subject matter jurisdiction over claims of unlawful carrier influence and coercion. The *Texas & New Orleans Railroad* decision, however, was decided before Congress added Section 2, Ninth to the Act, thereby establishing the NMB as the exclusive forum for representation disputes. In *Switchmen's Union*, this Court distinguished the circumstances presented by *Texas & New Orleans Railroad* and *Virginian Railway* from the very different circumstances presented by a representation dispute arising after the enactment of Section 2, Ninth:

> In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purposes of this Act.' That 'right' is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it . . . .

320 U.S. at 300-301. Thus, *Switchmen's Union* made clear that *Texas & New Orleans Railroad* and *Virginian Railway* cannot be read to establish federal court jurisdiction to determine issues relating to the employees'

choice of bargaining representative, which Congress gave the NMB the exclusive power to resolve.[22] Courts that have confronted arguments such as those made by ALEA here have had no difficulty in squaring the two lines of cases. *See, e.g., Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976); *see also Texidor v. Ceresa*, 590 F.2d 357 (1st Cir. 1978).

According to ALEA, under the "better-reasoned" lower court decisions as well as *Texas & New Orleans Railroad*, *Virginian Railway*, and *Chicago & Northwestern Railway*, "the proper inquiry is whether the relief sought will interfere with or usurp functions exclusively committed to the NMB." Pet. at 15. Even if ALEA were correct that the court below and other courts reaching similar results utilized a different standard, under *Switchmen's Union* the only proper answer to that inquiry in this case would have to be in the affirmative. An order requiring Northwest to recognize and negotiate with ALEA would not serve to ensure Northwest's "neutrality" during the NMB proceedings, but rather would decide who would represent the former Republic employees during the period it was in effect. Whatever arguments ALEA might make in support of allowing each union in a merger situation to continue to represent its members until the NMB decides who the representative at the combined operation will be, it is up to the NMB to decide whether or not to accept those arguments and adopt the policy ALEA advocates. To date, however, the NMB has not done so, and federal courts may not impose such a policy,

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[22] In *Chicago & Northwestern Railway*, this Court upheld federal jurisdiction to enforce Section 2, First of the Act, which requires a carrier to make every reasonable effort to make and maintain collective bargaining agreements. In so ruling, this Court noted that the NMB's jurisdiction did not extend to such disputes. 402 U.S. at 580-81.

even as a nominally "interim" measure.[23] *Switchmen's Union* makes clear that the NMB's jurisdiction over representation matters is complete, and the courts may not invade that jurisdiction even for the ostensible purpose of assisting the NMB in preserving its jurisdiction. The NMB—and the NMB alone—has the authority under the Act to determine what policies and procedures in representation matters are necessary to effectuate the statutory guarantees which it is charged to protect.

II. Northwest's Recognition Of BRAC And IAM As The Post-Merger Representatives Of The Former Republic Employees Did Not Violate The Railway Labor Act

Correctly noting that the court below did not reach the merits of its substantive allegations, ALEA nevertheless suggests that the Seventh Circuit's "approach" is contrary to the Act and controlling precedent. ALEA's suggestion is without merit. The mere fact that a carrier recognizes and bargains with one union during a representation dispute does not alone constitute unlawful interference or coercion under the Act.[24] *See Texidor v.*

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[23] ALEA's claim that failure to maintain the *status quo* will enable the carrier to make a unilateral choice as to the representative of its employees is erroneous. Under NMB policy, the choice is dictated by the circumstances of the merger. In any event, this case does not present the sort of blatant company unionism that was at issue in *Texas & New Orleans Railroad* and was held there to justify judicial intervention.

[24] Under the structure of the Act, there is no way for a carrier to raise a representation dispute before the NMB; only employees, or those seeking to represent employees, may do so. Nor is the carrier a formal party to representation disputes before the NMB. *See, e.g.*, Air Florida, Inc., 8 N.M.B. 546 (1981) (carrier lacks standing to challenge Board's waiver of election bar rule); Western Airlines, Inc., 7 N.M.B. 337, 338 n.1 (1980) (carrier's request for hearing on proper class or craft denied). Thus, in a merger context, the surviving carrier has no alternative but to honor the outstanding certificates of its own unions—in this case, BRAC and IAM. The displaced union then may invoke the NMB's services to investigate the representation dispute.

Ceresa, *supra*, 590 F.2d at 539 ("Negotiating and signing a collective bargaining agreement are not, in and of themselves, the kind of coercion envisioned by Section 2 Third"). Such actions have also been held insufficient to create a violation of the Act beyond the power of the NMB to address. *See Ruby v. American Airlines, Inc.*, *supra*, 323 F.2d at 254 (allegation that carrier unlawfully bargained with in-house union insufficient to take case out of representation dispute); *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, *supra*, 406 F. Supp. at 508-09 (allegation that carrier negotiations with rival union improperly coerced employees fell within NMB jurisdiction).

ALEA also challenges respondents' position that under applicable NMB precedent, its certification was extinguished by operation of law upon the merger of Republic into Northwest. ALEA's argument that Northwest has misread the NMB's merger decisions is not only incorrect; it also demonstrates the dependence of ALEA's substantive allegations on the representation issues now before the NMB. ALEA contends that the NMB decisions, rather than establishing that the certifications of unions on an "acquired" carrier are extinguished by operation of law, instead stand for the proposition that following a merger a carrier may voluntarily recognize a union which has a "clear majority" of the post-merger employee group. Because in the present case the identity of the majority union has not yet been determined by the NMB, ALEA argues that Northwest's voluntary recognition of BRAC and IAM was improper. Pet. at 22-24.

ALEA's argument fails on several counts. First, Northwest's understanding of NMB policy is not mere speculation. In accordance with its policy of certifying only a single representative for a system-wide craft or class at a carrier, the NMB looks at more than just the number of employees represented by the competing unions in deciding which will become the representative at the

combined operation. In *Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986), the NMB stated that "the most relevant factor" in determining whether a merger results in a single carrier is "the degree of integration of operations." 13 N.M.B. at 401. For example, in the Republic-Hughes Air merger, in order to determine the status of competing unions, the NMB examined, *inter alia*, the acquiring carrier's motive for the acquisition, including the existence of any anti-union animus; how the combined operation was going to be held out to the public; whether there would be combined management and flight operations; and whether there would be combined labor relations and payroll policies. *Republic Airlines, Inc. and Hughes Air Corp., supra*, 8 N.M.B. at 54-55. Indeed, the NMB's decision in *Republic* does not even mention which of the competing unions claimed a majority of the post-merger employees. Nevertheless, the NMB ruled that the certification of the union at the acquired carrier was "extinguished by operation of law." 8 N.M.B. at 56.

Second, even if ALEA were correct, Northwest had a reasonable basis for believing that its own craft designations would remain in place after the merger and that BRAC and IAM would continue to represent a majority of the employees in those crafts.[25] In these circumstances,

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[25] ALEA's claim that it will be the majority union in the combined employee group following the merger (Pet. at 3 n.3) is based on an assumption that the single Republic craft structure would survive the merger, rather than the two craft structure certified by the NMB at Northwest. Should the Northwest structure survive—which, given the NMB's consistent policy of recognizing the unions at the surviving carrier in an airline merger, is more likely to be the case—it does not appear that ALEA will have a majority in either Northwest craft. Although ALEA asserts in its Petition (Pet. at 4 n.3) that Northwest neither argued nor offered evidence in the district court that it believed BRAC and IAM would have a majority in the post-merger crafts, Northwest did in fact submit such evidence. *See* App. 404, 407. This evidence was submitted in response to arguments by ALEA in opposition to Northwest's motion to dismiss and was before the district court on ALEA's motion for reconsidera-

the mere fact that ALEA had challenged the representative status of BRAC and IAM before the NMB did not preclude further dealings with those unions as the certified representatives of Northwest's workforce.[26]

Most importantly, however, whether ALEA or Northwest is correct in its understanding of NMB policy, the pivotal nature of such policy to ALEA's allegations of statutory and contractual violations demonstrates beyond any doubt that this action is fundamentally representational in nature. A court simply cannot decide the merits of ALEA's complaint, or grant the injunctive relief ALEA has requested, without infringing on issues committed by Congress to the NMB's exclusive jurisdiction. In these circumstances, the decision of the court below is in full accord with longstanding precedent in this and other courts, and does not merit review.

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tion of the court's order dismissing this case. In any event, respondents agree with ALEA that the determination of majority status is the function of the NMB, and need not be resolved herein.

[26] ALEA cites Pan American World Airways, Inc. v. International Bhd. of Teamsters, *supra*, for the proposition that a carrier may not negotiate even with a certified union during the pendency of a representation dispute. Pet. at 21. In *Pan Am*, however, the court held only that a carrier could not be *required* to negotiate in such circumstances. Nothing in *Pan Am* or in any other case cited by ALEA stands for the proposition that a carrier is prohibited from negotiating with the certified representative of its employees in circumstances similar to those herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 86-442

In the

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONER

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November 6, 1986

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REPLY BRIEF OF PETITIONER

Petitioner Air Line Employees Association, International ("ALEA") files the present reply brief in response to the brief in opposition to ALEA's petition for certiorari filed by respondents Republic Airlines, Inc. ("Republic"), Northwest Airlines, Inc. ("Northwest") and NWA, Inc. ("NWA").[1]

I. Respondents' Arguments That the Seventh Circuit's Decision Neither Raises an Important Issue Nor Conflicts With Decisions of This Court or Other Courts of Appeals are Unpersuasive

Respondents offer a series of arguments in an effort to show that the present case does not merit review; each is unpersuasive.

A. The Court Below Erred in Holding That the Present Case Raises a Representation Dispute

Respondents argue that the court below correctly determined that ALEA's complaint raises a representation dispute (Respondents' Brief in Opposition (herein "Opp.") at 9-10). Respondents' conclusion, however, is based on a mischaracterization of ALEA's claim. ALEA did *not* ask the district court to determine that it, rather than some other union, is or should be certified for the indefinite future to be the post-merger collective bargaining representative of all employees in a merged craft or class or even of the Republic employees it has long represented, without regard to the results of the election to be held by the National Mediation Board ("NMB"). Moreover, ALEA has acknowledged that a determination of the appropriate craft or class necessarily has to be made by the NMB before it can hold an election and certify a representative. ALEA has acknowledged that it is the function of the NMB—after the NMB determines the appropriate craft or class on the merged airline—to conduct an election and thereafter to certify a representative based on the free choice of the affected employees. Thus, in this lawsuit—contrary to the argument of respondents—ALEA did not invite the district court to invade the province of the NMB either in determining the appropriate craft or

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[1] An amicus curiae brief in opposition to ALEA's petition for certiorari was filed by the Brotherhood of Railway and Airline Clerks ("BRAC") and the International Association of Machinists and Aerospace Workers ("IAM"). Since that brief makes no arguments not made by respondents, ALEA does not respond separately to that brief.

class or in certifying the post-merger collective bargaining representative. Rather, the present suit concerns respondents' conduct during the critical period between their announcement of a merger and the NMB's ultimate certification of a bargaining representative, during which the protections of section 2, Third and Fourth of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, Third & Fourth, against carrier interference, influence or coercion are so important. It is with respect to this period that the court below held that there is no judicial remedy—and hence no remedy at all—for violations of the RLA.

Indeed, respondents' principal acts of interference with, influence and coercion of employees in the selection of their representative were the acts, *prior to the consummation of the merger*, of unilateral recognition of and bargaining with other unions regarding employees represented by ALEA. It is undisputed that the NMB will not even entertain a representation petition prior to approval by the Department of Transportation of a merger. *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13 (No. 3) (1980); *Republic Airlines, Inc./Hughes Air West*, 7 NMB 432 (No. 219) (1980).[2]

In short, this case is not a representation dispute subject to the exclusive jurisdiction of the NMB, since ALEA did not ask the district court to determine either of the representation questions which are reserved for the NMB: what is the appropriate craft or class, and which union will be the certified representative following a representation election.

Respondents also assert that the interim judicial relief ALEA seeks "would not serve to ensure Northwest's 'neutrality' during the NMB proceedings, but rather would decide who would represent the former employees during the period it was in effect" (Opp. at 19). Respondents are in error in two respects. First, requiring respondents to recognize and bargain with ALEA prior to NMB certification would, in fact, go a long way toward ensuring the carriers' neutrality, since much of the carriers' assistance to and favoritism for BRAC and IAM is predicated on Northwest's recognition of those unions and its exclusion of ALEA from participation in contract administration (including grievance handling and participation in the System Board of Adjustment) and

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[2] The underlying grievance and the present lawsuit were both filed before the merger was approved by the DOT.

from having any of the other valuable rights, including communication with employees, which an incumbent union may exercise. Second, the judicial relief sought by ALEA would not decide the ultimate representation questions (the appropriate craft or class and the certification of a representative after an election); while it would continue the *status quo*—the existing status of ALEA as the representative of the Republic employees "during the period it was in effect" —that is not a decision of a representation question reserved for the NMB. The effect of such a court order would be only to require compliance with the substantive provisions of the RLA, which proscribe interference with, coercion and influence in the selection of a representative.

B. The Lower Courts Have Not Consistently Recognized That The Relief Sought Here Would Interfere With the NMB's Jurisdiction

Respondents' second argument is that the lower federal courts have consistently recognized that injunctions to preserve the *status quo* following a merger impermissibly interfere with the NMB's jurisdiction (Opp. at 11-15). ALEA, of course, does not dispute that some lower court decisions have taken an extreme view of the limitations of federal court jurisdiction, at least insofar as the breadth of the language used by those courts is concerned.[3]

Respondents are incorrect, however, in characterizing other cases as falling within the same line of cases. First, some cases, while declining to grant the particular relief requested, have merely held that the particular relief sought would have altered, rather than preserved, the *status quo* and therefore would not be a neutral judicial act.[4] Second, other courts, in declining federal court jurisdiction, have done so where, in the court's view, the request would have required

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[3] *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983); *Air Line Pilots Association, International v. Texas International Airlines, Inc.*, 656 F.2d 16, 23 (2d Cir. 1981).

[4] *E.g., Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert denied*, 369 U.S. 885 (1962), cited by the court in *Teamsters v. Texas International*, *supra*, for the proposition that the courts may not grant interim *status quo* injunctive relief, merely holds that *the particular relief there sought* would have altered, rather than preserved, the *status quo* and would therefore not have been a neutral judicial act.

the court effectively to determine the representational question—the identity of the employee representative—even though the complaint on its face purported to raise statutory or contractual, rather than representational, issues.[5] Third, in still other cases where courts have not upheld jurisdiction, they have suggested that under other circumstances jurisdiction could be invoked.[6] Other cases uphold jurisdiction even where a representation dispute may be involved.[7]

Thus, contrary to respondents' contention, the lower courts are by no means consistent in dealing with cases such as the present case where interim *status quo* relief is sought, and where the plaintiff does *not* seek judicial determination of the representation questions reserved to the NMB: the appropriate craft or class and the determination of the certified collective bargaining representative following a representational election.

C. Granting *Status Quo* Relief Would Not Decide the Representational Issue

Respondents also argue (Opp. at 12) that granting the relief requested in the present case would "constitute an

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[5] *E.g., Brotherhood of Railway & Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed as improvidently granted*, 379 U.S. 26 (1964); *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *Division No. 14, Order of Railroad Telegraphers v. Leighty, supra.*

[6] In *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir. 1976), *cert. denied*, 429 U.S. 961 (1976), cited by the district court in the present case, the court stated that the merger of Northeast with Delta Airlines, a much larger carrier, "created real doubts about whether plaintiffs [the union previously certified as representative of Northeast's mechanics] represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board." The implication was that, absent such doubts, the court might have been willing to entertain the case. And, in *Aircraft Mechanics Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492, 508 (N.D. Cal. 1976), the court found that the exclusive jurisdiction of the NMB precluded judicial intervention except in "extreme cases of rampant employer domination of the labor relations scene such as are exhibited by company union situations." Approving that view, the First Circuit, in *Texidor v. Ceresa*, 590 F.2d 357, 359 (1st Cir. 1978), likewise held that "the implied grant of judicial jurisdiction under Section 2 Third should be limited to the kind of coercion and outrageous company unionism involved in *Texas & N.O. Ry. Co.* . . ., the case which first announced that such jurisdiction existed."

[7] *See* cases cited in ALEA's petition at 18-19 nn. 19 & 20.

active, interim disposition of the representation question" and would thus interfere with the NMB's exclusive jurisdiction. As indicated above, the NMB does not even have jurisdiction until a merger is approved by the DOT, prior to which period the principal violations of the RLA occurred in this case and are likely to occur in other airline mergers.

In addition, even as to the period after the merger is approved, the relief sought in the present case would not interfere, but would aid, the NMB in assuring a representation election free of carrier coercion, influence and interference. This is true not only because the NMB has no authority to order a carrier to recognize or bargain with a particular union. It is also true because a *status quo* injunction does *not* decide the representation questions (the appropriate post-merger craft or class and which union is the certified representative following an election). Rather, such *status quo* relief would accomplish just that: preserving the *status quo* so that each union may continue to represent those employees who have selected it prior to the merger, until the NMB determines the appropriate craft or class in which representation is to be established following the merger and certifies a representative for that craft or class.

D. The NMB Procedures Are Not Adequate to Provide the Relief Sought

Respondents also argue that the NMB's procedures are adequate to provide relief of the sort sought by ALEA (Opp. at 15-17). This argument is belied by the NMB's own description of its limited authority[8] and by judicial confirmation of such limited authority.[9]

Respondents nevertheless assert that there are three remedies which ALEA could obtain from the NMB. "First,"

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[8] *Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13 (1980) (No. 3) (denying *status quo* order, explaining: "[t]he NMB has never claimed to have any power to control a carrier's actions or to vindicate the ultimate rights of a representative. Its only function is to investigate and determine who is the employee's representative."); *Pan American World Airways, Inc.*, 7 NMB No. 110 (1980) (denying *status quo* order, stating that "the issuance of such a bargaining order is an adjudicatory matter properly in the province of the federal courts rather than the National Mediation Board").

[9] *Chicago & North Western Railway Co. v. United Transportation Union*, 402 U.S. 570, 580-81 (1971); *Air Line Pilots Association, International v. Scheduled Skyways, Inc.*, 567 F. Supp. 171, 180-81 (W.D. Ark. 1983).

according to respondents, "ALEA can ask the NMB to adopt a policy whereby the certificate of the union at an 'acquired' carrier continues to be effective until an election is held to determine the post-merger employee representative" (Opp. at 16). The NMB, however, is apparently of the view that it has no such authority. Thus, for example, the NMB has explained that "it is clear that any person aggrieved by action of another must seek damages or injunctive relief *(including a status quo order) in a court of competent jurisdiction, and not from the NMB." Republic Airlines, Inc./Hughes Air Corp.*, 8 NMB 13, 18 (No. 3) (1980) (emphasis added).

Respondents' second suggestion is that "ALEA can ask the NMB to investigate whether Republic or Northwest is the 'surviving' carrier" (Opp. at 16). Even if the NMB were inclined to grant such a request, such an investigation would not lead to an effective remedy for violations of the RLA either prior to the consummation of a merger (when the NMB will not assert jurisdiction), or while the NMB is conducting such an investigation. Moreover, since the NMB has no authority to issue a bargaining order, *Pan American World Airways, Inc.*, 7 NMB (No. 110) (1980); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 304 (1943), even if its investigation determined that Republic were the surviving carrier, it could not remedy, on an interim basis, respondents' violations of the RLA by ordering respondents to recognize and bargain with ALEA.

Respondents' third suggested NMB-related remedy is that "ALEA can petition the NMB for an election" (Opp. at 16). ALEA, of course, has done just that; but, for the reasons stated in ALEA's petition and herein, such a proceeding cannot remedy the violations of the RLA which have occurred and will continue to occur pending NMB certification of a representative.

E. The Decision Below is Inconsistent With the Decisions of This Court

Respondents also argue that the decision below is not inconsistent with the decisions of this Court (Opp. at 17-20). Their argument is, in essence, that *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), is the controlling decision and is consistent with the decision below. *Switchmen's Union*, however, was a case in which the union sought to set aside an NMB certification, 320 U.S. at 299; the

right sought to be vindicated was the right to the determination of the employees' representative, the very representation question to be decided by the NMB. *Id.* at 300.

The Court, however, carefully distinguished those situations where, absent federal court jurisdiction, the RLA would be "robbed of its vitality and thwarted of its purpose." *Id.* In recognizing the need for federal court jurisdiction in such situations, the Court cited *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930),[10] and *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937), for the proposition that federal court jurisdiction must be available where its absence would render a right provided for in the RLA unenforceable. 320 U.S. at 300.

Thus, *Switchmen's Union* confirms that federal court jurisdiction is available except where a genuine representation question is raised. This Court's decisions thus are inconsistent with the decision below.

II. On the Merits, Respondents Have Violated the RLA

Respondents argue that their recognition of BRAC and IAM does not violate the RLA (Opp. 20-23).

First, respondents argue that "[t]he mere fact that a carrier recognizes and bargains with one union during a representation dispute does not alone constitute unlawful interference or coercion under the Act" (Opp. at 20).[11]

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[10] Respondents argue that since *Texas & New Orleans Railroad* was decided *before* Section 2, Ninth was added to the RLA, it is no longer viable (Opp. at 18). However, this Court cited *Texas & New Orleans Railroad* approvingly in the *Switchmen's Union* case. 320 U.S. at 300. Moreover, as indicated in *Switchmen's Union*, the purpose of section 2, Ninth was "to strengthen and make more effective the process of collective bargaining," and was "aimed not only at company unions which had long plagued labor relations [citation omitted], but also at numerous jurisdictional disputes between unions." 320 U.S. at 302. It would be ironic, indeed, for a statutory provision with such purposes to be used as the basis for allowing a carrier to select the employees' representative.

[11] While respondents are correct in noting that the gravamen of ALEA's claims concerns Northwest's recognition, bargaining with, and entering into an agreement with other unions prior to the NMB's determining the appropriate craft or class and prior to the NMB's certification of the representative following an election, the impact of Northwest's acts was far from trivial. In addition to the effects of such conduct described in ALEA's petition (at 5-6), the effects include expelling ALEA from the property of the merged carrier and denying ALEA

(footnote continued on next page)

Respondents, however, overlook the critical fact that they have recognized and bargained with BRAC and IAM to the exclusion of ALEA at a time when there could be no good faith basis for believing that the NMB will agree with respondents' definition of the appropriate craft or class or for believing that BRAC and IAM will have a clear majority in whatever craft or class the NMB determines. *See* Petition at 3-4 n.3. Such conduct violates the RLA. *See Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 548-49 (1937); *Pan American World Airways, Inc. v. Int'l Brhd of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd*, 404 F.2d 938 (2d Cir. 1969).[12] To the extent there is any doubt that such unilaterally determined recognition in the face of pending NMB proceedings violates the RLA, the issue is of sufficient importance to warrant review by this Court.

Respondents also differ with ALEA on the correct interpretation of the NMB's cases, regarding whether certifications of unions on an "acquired" carrier are "extinguished by operation of law" (Opp. at 21), without regard to whether such unions may in fact have the support of a majority of the employees of the merged groups (*see* Petition at 20-24). Respondents thus argue that federal courts may not grant relief in cases like the present case because, they assert, the NMB has adopted a policy that the union on the "acquiring carrier" has no representational rights pending an election—regardless of the percentage of employees it represents. Even if respondents were to be found to be correct, the present case is an appropriate vehicle for the Court to square such a policy with the statutory requirement that a union must be

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(footnote continued from preceding page)

representatives access during working hours to either the former Republic employees previously represented by ALEA, or the former Northwest employees represented by BRAC and IAM, during the critical period preceding the NMB election. Meanwhile, BRAC and IAM enjoy full access to the voting employees, on company time and on company property. All this has occurred at a time when Northwest had no good faith basis for a belief that BRAC and IAM represent a majority of the post-merger craft or class, or even for a good faith belief as to how the NMB will define the appropriate craft or class. *See* Petition at 3-4 n.3.

[12] Similarly, under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, it is unlawful to recognize or enter into an agreement with a union when there is a pending question of representation. *See, e.g., NLRB v. Hudson Berlind Corp.*, 494 F.2d 1200, 1203 (2d Cir. 1974).

supported by a majority of the employees.[13] 45 U.S.C. § 152, Fourth.

Respondents also argue that Northwest's recognition of BRAC and IAM was lawful because Northwest had a "reasonable basis for believing that its own craft designations would remain in place after merger and that BRAC and IAM would continue to represent a majority of the employees in those crafts" (Opp. at 22). ALEA disputes the factual basis for respondents' assertion. *See* Petition at 3-4 n.3. In any event, since the district court dismissed on jurisdictional grounds, it made no finding on this issue. Therefore, for purposes of this petition, the legality of Northwest's recognition cannot be predicated on its assertions of good faith.

Finally, respondents argue that "whether ALEA or Northwest is correct in its understanding of NMB policy, the pivotal nature of such policy to ALEA's allegations of statutory and contractual violations demonstrates beyond any doubt that this action is fundamentally representational in nature" (Opp. at 23). Respondents' argument is a *non sequitur*: Regardless of the NMB policy as to whether the certification of the acquired union is "extinguished by operation of law" (even where there is doubt as to the appropriate craft or class in the merged employee group and where the majority status of the various unions is in doubt), the relief sought by ALEA is not representational, since ALEA does not ask a court to determine the appropriate craft or class or to certify the collective bargaining representative.

Accordingly, the Court should grant certiorari to consider not only the jurisdictional question, but also the important substantive question of whether a carrier in an airline merger violates the RLA by unilaterally recognizing a union pending NMB determination of the craft or class and certification of the representative, where the carrier cannot determine which union will command a post-merger majority and the proper craft or class is unclear.

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[13] Indeed, since there may be no judicial review following an NMB certification, *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 300 (1943), there may be no opportunity for such a policy of the NMB to be subjected to judicial scrutiny in light of the RLA unless such scrutiny occurs in a case whose posture is like that of the present case.

CONCLUSION

For the foregoing reasons and for the reasons set forth in ALEA's petition, the petition for certiorari should be granted.

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No. 86-442

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AIR LINE EMPLOYEES ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

REPUBLIC AIRLINES, INC., NORTHWEST AIRLINES, INC., NWA, INC., BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICI CURIAE BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the National Mediation Board has exclusive jurisdiction over disputes under the Railway Labor Act concerning representation rights of competing unions following the merger of two airlines.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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AMICI CURIAE BRIEF IN OPPOSITION

Amici curiae Brotherhood of Railway and Airline Clerks and International Association of Machinists and Aerospace Workers request the Court to deny the petition for writ of certiorari, seeking review of the Seventh Circuit's judgment in this case. The opinion of the Seventh Circuit is now reported at 798 F.2d 967.

INTEREST OF THE AMICI CURIAE

Amici Curiae are the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes ("BRAC") and the International Association of Machinists and Aerospace Workers ("IAM").

BRAC is the certified collective bargaining representative of the craft or class of clerical, office, fleet and passenger service employees on Northwest Airlines, Inc. ("Northwest"). The IAM is the certified collective bargaining representative of, among others, the mechanics and related craft or class on Northwest. BRAC and the IAM's interest in this action is readily apparent as they are the unions whose post-merger certifications are recognized by Northwest and consequently the subject of this action by the Air Line Employees Association, International ("ALEA"). Northwest and ALEA have both consented to BRAC and the IAM's participation as *amici curiae*.

BRAC and the IAM are participating as *amici curiae* because ALEA brought its action in the Northern District of Illinois and did not name either BRAC or the IAM as parties. BRAC and the IAM filed a joint motion to intervene. The district court did not rule on that motion prior to dismissing the entire action for lack of jurisdiction. Thus, BRAC and the IAM are participating, with this Court's approval, as *amici curiae*.

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case fails to discuss the opinions below. We summarize the opinions here because they demonstrate the soundness of the courts' rulings on the issue presented.

The district court declined to hear the merits of petitioner's complaint holding that: "[i]n view of the overwhelming and well-developed case law", petitioner's complaint presented a "representation dispute over which the federal courts do not have jurisdiction" (Pet. App. A-6).

The court of appeals affirmed, holding that "[g]iven the Mediation Board's undeniable sole jurisdiction over representation matters, we infer . . . a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bar-

gaining agreements." 798 F.2d at 968-9, *quoting International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157, 164 (5th Cir. 1983). Like the district court, the Seventh Circuit "found no reason to depart from the consistent well-considered analysis of [their] colleagues in other circuits." 798 F.2d at 968. The Seventh Circuit recognized that although petitioner's complaint was "couched in terms of enforcing the collective bargaining agreement", the underlying dispute was "basically a representational dispute and therefore committed to the sole jurisdiction of the [National Mediation Board]." *Id.*

REASON FOR DENYING THE WRIT

THE JUDGMENT BELOW IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT, THE COURTS OF APPEALS AND THE NATIONAL MEDIATION BOARD.

This Court has held in a series of cases that representation disputes which arise under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, are within the sole discretion of the National Mediation Board ("NMB"). *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R. Co.*, 320 U.S. 323 (1943); *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338 (1943).

In recent years a number of representation disputes have arisen as a result of numerous mergers which have taken place in the airline industry. The courts of appeals have held, without exception, that employee representation disputes which inevitably arise as a result of such acquisitions are not within the federal court's jurisdiction, but must be brought before the NMB. *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n, Int'l* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *International*

Ass'n of Machinists v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks* v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

Finally, the NMB has established policy guidelines governing representation disputes arising out of consolidation of the work force following airline mergers. *Republic Airlines, Inc. and Hughes Air Corp.*, 8 N.M.B. 49 (1980); *Republic Airlines, Inc.*, 7 N.M.B. 21 (1979). Such policy provides for recognition of the union certifications on the surviving carrier coupled with a lesser showing of interest (35%) than ordinarily required by the ousted unions in order to obtain a new and prompt election. Based on this overwhelming uniform case law and the NMB's policy governing disputes such as petitioners which arise in the context of airline aquisitions, the petition for writ of certiorari should be denied.

A. Prior Decisions of this Court Vest Exlusive Jurisdiction Over Representation Disputes with the National Mediation Board.

Section 2, Ninth of the Railway Labor Act states that "[i]f any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . . it shall be the duty of the Mediation Board . . . to investigate such dispute and to certify . . . the names . . . of the . . . organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier." 45 U.S.C. § 152, Ninth.

This Court has held, pursuant to Section 2, Ninth, that representation disputes involving controversies surrounding the designation and authorization of representatives of employees covered under the Railway Labor Act are committed to the specific jurisdiction of the NMB. *Switchmen's Union* v. *NMB*, *supra*, 320 U.S. 297. In

Switchmen's Union v. *NMB*, the union sued in federal court to overturn the NMB's certification of a rival union. This Court held that federal courts lack jurisdiction over representation disputes and that the NMB's jurisdiction under Section 2, Ninth of the Railway Labor Act was exclusive and not subject to review. The Court noted that the congressional intent in drafting that section of the Railway Labor Act was that the "dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law." 320 U.S. at 305.

In *General Committee* v. *M-K-T*, *supra*, 320 U.S. 323, this Court considered a jurisdictional dispute between two unions over which union was the proper representative for the presentation of various claims to the employer. In a situation similar to this case, the carrier reached an agreement with one of the unions which the other union argued was void and violative of Section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth. 320 U.S. at 333.

This Court observed that the Railway Labor Act established a general principle of collective bargaining and "applied a command or prohibition enforceable by judicial decree to only some of its phases . . . . ." *Id.* at 335. The Court went on to state that Section 2, Ninth of the Railway Labor Act was designed to "resolve a wide range of jurisdictional disputes between unions." *Id.* at 336. "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board." *Id.*

In *General Committee* v. *M-K-T*, this Court noted that "the command of the [RLA] should be explicit and the purpose to afford a judicial remedy plain" before the Court should imply jurisdiction. *Id.* at 337. This Court

acknowledged that "[t]here may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration . . . . Courts should not rush in where Congress has not chosen to tread." *Id.* (citation omitted). Finally, in a companion case to *Switchmen's Union* v. *NMB* and *General Committee* v. *M-K-T*, this Court held that "Congress left the so-called jurisdictional controversies between unions to agencies and tribunals other than the Courts." *General Committee of Adjustment* v. *Southern Pacific Co.*, 320 U.S. 338, 344 (1943).

B. Courts of Appeals Have, Without Exception, Rejected Jurisdiction Over Representation Disputes Arising Out Of Airline Mergers.

The courts of appeals have held, without exception, that the NMB has exclusive jurisdiction over inter-union disputes arising out of airline mergers and acquisitions. *International Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983); *Air Line Pilots Ass'n, Int'l* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.) *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry & S.S. Clerks* v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964).

BRAC v. *United Airlines, supra*, 325 F.2d 576, concerned an action filed by BRAC following the United Airlines merger with Capital Airlines. BRAC, which had represented former Capital employees, argued that United was bound by the terms of Capital's collective bargaining agreements. The Sixth Circuit held that although the complaint was couched in terms of a contract dispute, it actually involved a representation dispute and therefore was not within the court's jurisdiction. 825 F.2d at 579.

IAM v. *Northeast Airlines, supra*, 536 F.2d 975, involved the merger of Northeast Airlines into Delta Airlines. The IAM had been the representative of certain employees on Northeast prior to its merger with Delta. The union sued over the carrier's refusal to bargain. The First Circuit affirmed the dismissal of the complaint stating that "[a]t the very least, the merger created real doubts about whether plaintiffs represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board." 536 F.2d at 977.

ALPA v. *Texas Int'l Airlines, supra*, 656 F.2d 16, involved a corporate restructuring of Texas International Airlines which resulted in the creation of New York Air. Following such restructuring, New York Air refused to recognize the Air Line Pilots Association and instead entered into employment contracts with individual pilots. ALPA sued Texas Air and New York Air seeking an order requiring the carriers to recognize ALPA and enjoining them for refusing to honor the ALPA collective bargaining agreement. The Second Circuit noted that the case did not "present a traditional representation dispute; . . . [n]evertheless, even in such unconventional contexts, section 2, Ninth affords the sole and mandatory means for resolving disputes over representation." 656 F.2d at 24 (citation omitted). The court held that "as soon as the action reveals a representation dispute, the court is required to dismiss the complaint." *Id.* at 23 (citation omitted).

Finally, following the acquisition of Continental Airlines by Texas International Airlines, the Teamsters brought an action in federal court seeking an order requiring Texas Air to honor the Teamsters' collective bargaining agreement with Continental. *IBT* v. *Texas Int'l Airline, supra*, 717 F.2d 157. The Fifth Circuit held that the dispute was actually a representation dispute and

therefore committed to the sole jurisdiction of the NMB. "A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims." 717 F.2d at 161. The Fifth Circuit held that a court should not even grant a *status quo* injunction if an underlying representation dispute exists, as that would result "at least for the period of the injunction, of deciding the representation issue." *Id.* Thus, the court inferred a congressional intent to allow the NMB "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164.

C. The National Mediation Board Has Established Policy Guidelines Governing Inter-Union Representation Disputes Following Airline Mergers.

The NMB has established a policy governing disputes which arise in the context of airline mergers. In *Republic Airlines, Inc. and Hughes Air Corp*, 8 N.M.B. 49 (1980), which involved the merger of Hughes Airwest with Republic Airlines, the NMB determined that where the merged carrier would hold itself out to the public as a single airline, only one certified bargaining representative per craft or class would remain, that of the surviving carrier. The NMB held that "all certifications on [the acquired airline] were extinguished by operation of law upon Airwest's acquisition by Republic." 8 N.M.B. at 56. The Board observed that permitting classifications of the merged carrier to survive a merger would lead to "uneven representation, duplication of effort and confusion" and would reduce the ability of airlines to integrate operations and to maintain a single system. *Id.* at 54-55; *see also IBT* v. *Texas Int'l Airlines*, *supra*, 717 F.2d at 163.

The National Mediation Board, however, affords special protection to a union such as the petitioner whose certifications are extinguished as the result of the merger.

The NMB policy guidelines provide that a union which previously represented the craft or class "on any carrier involved in the merger or similar action" may, within sixty days of the government's approval of the merger, file an application supported by only a thirty-five (35) percent showing of interest instead of the majority interest ordinarily required by the Board. *Republic Airlines, Inc.*, 7 N.M.B. 21, 22 (1979). Moreover, such showing of interest may be evidenced by dues check-off authorizations which the ousted union obtained pursuant to a check-off agreement with the acquired airline. *Id.*

It is evident that this case presents a representation dispute arising as a consequence of the acquisition of Republic Airlines by Northwest Airlines. The Seventh Circuit's decision is therefore fully in accord with prior decisions of this Court, the courts of appeals which have considered similar issues and the NMB's policy guidelines governing airline mergers and acquisitions.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

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